United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

859

JOINT APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23993

HELENA HILDA BUTTERFIELD,

Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Appellee.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

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Info. on Desk

Form approved
Budget Bureau No. 43-R418.3

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DATE FILED

$10.00 FEE STAMP 150-25

Washington, D.C.

JAN 19 1968

Date _____ Verified by YK

TO THE SECRETARY OF STATE

...ition was filed on _____. The petition is approved

status under section 203(a) ( ).

...pproval expires: _____

☒ Sec. 212(a)(14) certification attached.
☐ Blanket Sec. 212(a)(14) certification issued.

The petition is revalidated to _____.

☐ Sec. 212(a)(14) certification attached.
☐ Blanket Sec. 212(a)(14) certification issued.

REMARKS	DISTRICT DIRECTOR		DISTRICT DIRECTOR	
	DISTRICT	DATE	DISTRICT	DATE

PETITIONER IS NOT TO WRITE ABOVE THIS LINE

Read this form and the attached instructions carefully before filling in petition

Petition is hereby made to classify the status of the alien beneficiary named herein for issuance of an immigrant visa as ("X" one)

☒ A THIRD PREFERENCE IMMIGRANT—An alien who is a member of the professions, or who because of his exceptional ability in the sciences or arts will substantially benefit prospectively the national economy, cultural interests or welfare of the United States. (Sec. 203(a)(3) Immigration and Nationality Act, as amended.) If this box is checked, the alien or a person on his behalf, must complete only Part I, below.

☐ A SIXTH PREFERENCE IMMIGRANT—An alien who is capable of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States. (Sec. 203(a)(6), Immigration and Nationality Act, as amended.) If this block is checked, alien's prospective employer must complete Parts I and II below.

(If you need more space to answer fully any questions on this form, use a separate sheet, identify each answer with the number of the corresponding question and sign and date each sheet.)

PART I—INFORMATION CONCERNING ALIEN BENEFICIARY

1. NAME (Family name in capital letters)	(First name)	(Middle name)	(Maiden name, if alien is a married woman)
BUTTERFIELD	HELENA	HILDA	—

2. BIRTHDATE	3. BIRTHPLACE (City or town)	(State or province)	(Country)	4. PRESENT NATIONALITY OR CITIZENSHIP
30 March 1917	BANGALORE	S. INDIA		BRITISH [illegible]

5. PRESENT ADDRESS (Number and street) 1514 BILTMORE ST. N.W. (City or town) WASHINGTON (State or province) D.C. (Country) U.S.

6. ADDRESS IN THE UNITED STATES WHERE ALIEN WILL RESIDE 1514 BILTMORE ST. N.W. WASHINGTON D.C.

7. PROFESSION OR OCCUPATION PRESIDENT & DIRECTOR - EDUCATIONAL & CULTURAL ARTS

8. DOES BENEFICIARY INTEND TO ENGAGE IN HIS PROFESSION OR OCCUPATION IN THE UNITED STATES? ☐ YES ☐ NO. IF "NO," EXPLAIN.
Intends to operate international cultural activities promoting the exchange in language - history - literature - musical relations

9. TO YOUR KNOWLEDGE, HAS A VISA PETITION EVER BEEN FILED ON BEHALF OF THIS BENEFICIARY BASED ON HIS PROFESSION OR OCCUPATION?
☐ YES ☒ NO. If "Yes," give name of each petitioner and date and place of filing.

10. HAS THIS BENEFICIARY EVER BEEN IN THE UNITED STATES? ("X" ONE) ☐ YES ☐ NO	11. ALIEN REGISTRATION NUMBER, IF ANY A17 152 277
12. TO YOUR KNOWLEDGE, HAS THIS BENEFICIARY EVER BEEN DEPORTED FROM THE UNITED STATES? ("X" ONE) ☐ YES ☒ NO	12A. IF YOU MARKED "YES," GIVE THE DATE AND PLACE WHERE HIS DEPORTATION HEARING WAS HELD.

13. BENEFICIARY'S SPOUSE — NAME (Last name) _____ (First name) _____ (Middle name) _____

COUNTRY OF BIRTH	DATE OF BIRTH	PRESENT ADDRESS (No. and Street) (City or town) (State or Province) (Country)

14. BENEFICIARY'S CHILDREN

NAME (Show M or S for married, or single)	M.S.	BIRTHDATE	COUNTRY OF BIRTH	PRESENT ADDRESS

DENIED

1-1- 11/22/66

15. "X" THE APPROPRIATE BOX BELOW AND FURNISH THE INFORMATION REQUIRED FOR THE BOX MARKED.

☐ Alien will apply for a visa abroad at the American Consulate in _____ (City in foreign country) _____ (Foreign country)

☐ Alien is in the United States and will apply for adjustment of status to that of a lawful permanent resident in the office of the Immigration and Naturalization Service at _____ (City) _____ (State). If the application for adjustment of status is denied the alien will apply for a visa abroad at the American Consulate in _____ (City in foreign country) _____ (Foreign country)

PART II—INFORMATION CONCERNING PETITIONING EMPLOYER

16. NAME OF PETITIONER (Full name of organization; if petitioner is an individual give full name with last in capital letters)

17. ADDRESS (Number and street) (Town or city) (State) (ZIP code)

18. IF THE BENEFICIARY WILL BE EMPLOYED AT A LOCATION OTHER THAN AT THE ABOVE ADDRESS, GIVE ADDRESS OF PLACE WHERE HE WILL WORK.

19. HAVE YOU EVER FILED A VISA PETITION FOR AN ALIEN BASED ON HIS PROFESSION OR OCCUPATION? ☐ YES ☐ NO. IF "YES," HOW MANY SUCH PETITIONS HAVE YOU FILED?

20. ARE SEPARATE PETITIONS BEING SUBMITTED AT THIS TIME FOR OTHER ALIENS? ☐ YES ☐ NO. IF "YES," GIVE NAME OF EACH ALIEN.

21. IS THIS PETITION BASED ON AN UNEXPIRED CERTIFICATION OF THE DEPARTMENT OF LABOR FOR A SPECIFIED NUMBER OF ALIENS WHO WILL PERFORM IDENTICAL SERVICES? ☐ YES ☐ NO. If "Yes," give file number of petition to which certification is attached.

22. THE FOLLOWING DOCUMENTS ARE SUBMITTED AS A PART OF THIS PETITION AND ARE MADE A PART THEREOF.

OATH OR AFFIRMATION OF PETITIONER OR AUTHORIZED REPRESENTATIVE

23. This petition was prepared by: ("X" one) ☒ the petitioner ☐ another person.
If petition was prepared by another person, Item 24 below must "also" be completed.
The petition may be subscribed and sworn to or affirmed only by the following persons:
In third preference cases—by the beneficiary himself, or by the person filing the petition on the beneficiary's behalf.
In sixth preference cases—by the employer who desires and intends to employ the beneficiary. If the employer is an organization the petition must be signed, subscribed and sworn to or affirmed by a high level officer or employee of the organization.

I swear (affirm) that I have examined the contents of this petition and the accompanying documents and that the statements in this petition and the accompanying documents are true and correct to the best of my information and belief.

Signature _____ (Petitioner's full true, and correct name) Title _____

Subscribed and sworn to (affirmed) before me this 17th day of January A.D. 19 [illegible]

at Washington DC

[SEAL] My commission expires _____ (Signature of officer administering oath) (Title)

24. SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN PETITIONER

I declare that this document was prepared by me at the request of the petitioner and is based on all information of which I have any knowledge.

_____ (Signature) _____ (Address) _____ (Date)

TO PETITIONER: DO NOT FILL IN THIS BLOCK—FOR USE OF IMMIGRATION OFFICER

Questions numbered ( ) to ( ) were made by me or at my request. _____ (Date) _____ (City)

_____ (Signature of petitioner or authorized member of petitioner's organization) _____ (Title)

The signature appears immediately above was interviewed under oath and affirmed all allegations contained herein.

_____ (City) _____ (Signature and Title)

FORM ES-575

APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION

Budget Bureau No. 44-R1301
Expiration Date: 8/31/66

PART A — STATEMENT OF QUALIFICATIONS OF ALIEN (ES-575A)

IDENTIFYING AND PERSONAL DATA

1. NAME OF ALIEN (Family name in capital letters)	(First name)	(Middle name)	(Maiden name, if alien is a married woman)
BUTTERFIELD	HELENA	HILDA	———

2. ALIEN'S BIRTHDATE	3. BIRTHPLACE (City or town)	(State or Province)	(Country)	4. PRESENT NATIONALITY OR CITIZENSHIP
30 March 1917	Bangalore	South	India	British (G.B.)

5. PRESENT ADDRESS (Number and Street)	(City or town)	(State or Province)	(Country)
1826 Biltmore St., N.W.	Washington	D.C.	20009.

6. ADDRESS IN UNITED STATES WHERE ALIEN WILL RESIDE

1826 Biltmore St., N.W. Washington, D.C. 20009.

7. KIND OF WORK ALIEN IS SEEKING	8. IF ALIEN IS SEEKING CHANGE OF CLASSIFICATION GIVE TYPE OF VISA NOW HELD
Promotion of Educational and cultural work	

EDUCATION AND TRAINING

NAMES AND ADDRESSES OF SCHOOLS, COLLEGES OR UNIVERSITIES	FIELD OF STUDY	FROM	TO	DEGREES OR CERTIFICATES RECEIVED
University of Wales G.B.	English	1947	1948	1st yr pass
University College of Swansea	Greek	1947	1948	2nd " "
Royal Academy of Music	English ~~History~~	1947 ~~1947~~	1950 ~~1951~~	Final " ~~Honours "~~
ignore Studios London and usical Director of Rowe Opera ouse -pianoforte and voice.	French	London Ma	triculation and Histo reading - writing & tra	

SPECIAL QUALIFICATIONS AND SKILLS

10. DESCRIBE SPECIAL QUALIFICATIONS POSSESSED (*List any certificates or licenses that give evidence of alien's abilities. For example, as required for employment in occupations such as architect, engineer, lawyer, physician, surgeon, teacher*).

Special qualification lies in experience in opening and directing Schools of Languages and Cultural Centres, arranging tours and wide student exchan

11. DESCRIBE ANY SPECIAL SKILLS ALIEN POSSESSES AND PROFICIENCY IN THE USE OF TOOLS, MACHINES OR EQUIPMENT.

travel programs between English and Italian students. Promoting summer schools and concerts for young professional artists and international groups.

12. GIVE ANY ADDITIONAL INFORMATION CONCERNING ALIEN NOT GIVEN ELSEWHERE WHICH WOULD HELP ESTABLISH ALIEN'S QUALIFICATIONS.

Centres of former experience - London - Rome - Berkeley - San Francisco - Los Angeles and Washington D.C.
Petitioner is also a Vocal Concert Artist, has knowledge of Italian as 3rd language.

13. LIST DOCUMENTS ATTACHED WHICH ARE SUBMITTED AS EVIDENCE THAT ALIEN POSSESSES THE EDUCATION, TRAINING, EXPERIENCE AND ABILITIES REPRESENTED.

1). Transcripts of School records.
2). Certificate of B.A. Degree, Magna Cum Laude.
3). Letters from Cambridge University and Business Names Registrar in London.

(MAKE NO ENTRY IN THIS SECTION — FOR DEPARTMENT USE ONLY)

ALIEN EMPLOYMENT DETERMINATION

The following determination is made in accordance with section 212(a)(14) of the Immigration and Nationality Act, as amended:

certified ☒ not certified ☐

Reason if not certified: availability of U. S. Workers ☐ adverse effect on U. S. Workers ☐

JUN 15 1966 Frank H Cassell
(Date) Frank H. Cassell, Director, United States Employment Service

Pursuant to section 284(b) of Immigration and Nationality Act, as amended and regulations promulgated thereunder, the following advice is given.

1. Job offered is not deemed to be seasonal or temporary.
2. Alien is qualified for: Job ☐ Third Preference ☒ Schedule A ☐ Other ☐
3. See attached statement for advice on alien's qualifications. ☐

Frank H. Cassell, Director
United States Employment Service

(SEE OVER)

EXPERIENCE

(List the most important jobs related to alien's admission, starting with the most recent)

NAME AND ADDRESS OF EMPLOYER
Self-employed since graduating from the University in 1951 - 1966

NAME OF JOB	DATE STARTED	DATE LEFT	KIND OF BUSINESS
Teaching	1951	still teaching	languages, piano and voice

DESCRIPTION OF WORK PERFORMED
INDIVIDUAL and CLASS INSTRUCTION in English to foreign students and preparation for Cambridge University Examinations, also teaching piano and voice/

DIRECTING and SUPERVISING language courses given by highly-qualified teaching Staff preparing students for examinations of Cambridge University, Alliance Francaise, and other accredited Boards of Exams.

NAME AND ADDRESS OF EMPLOYER

	DATE STARTED	DATE LEFT	KIND OF BUSINESS
Regent Schools of Languages	1954	1960	Centres estb. London and Rome, Italy.

DESCRIPTION OF WORK PERFORMED
Students in Italy numbered 1,000 - teaching Staff 20. Cultural tours of both capital cities were arranged as part of wide student exchange programs where travel facilities and economic fares were obtained as the Regent School Organisation co-operated with Travel Agencies. Concerts by numerous British, Italian and American students studying in Italy on Fulbright Scholarships were included in the cultural programs set-up by the School.

NAME AND ADDRESS OF EMPLOYER
Regent International Cultural Organisation. California.

NAME OF JOB	DATE STARTED	DATE LEFT	KIND OF BUSINESS
Regent Concert Series.	1962	1963	artists for young professional

DESCRIPTION OF WORK PERFORMED
PROMOTION OF SERIES OF 12 CONCERTS for 24 young professional artists.

with view to providing them oppoetunities of appearing before the public on several occasions during the same season, to gain experience & confidence. The first concert was for the American International Laureate Winner at the Tschaikovsk Competition in Moscow in Spring 1962.

LIST NAMES AND ADDRESSES OF OTHER EMPLOYERS IN PAST FIVE YEARS AND DESCRIBE WORK PERFORMED FOR EACH
REGENT FOUNDATION - Los Angeles 1963- 1964.

PROMOTION OF SUMMER SCHOOL for children and young people of Filipion Community of L.A. with view to thier learing their national folk songs and dance

PROMOTION of 2 Concects at the International Institute of L.A. and the at the Hollywood High School Auditorium, in an endeavour to enabling this minority group to make a definite cultural contribution to the U.S. culture.

PERSONAL VOCAL CONCERTS. The petitioner has continuously given concerts in London at Chencil Galleries, St. Martin's in the Fields Church London, in Sala Boromini, in Rome, and in churches in Berkeley, Los Angeles, and Washing[illegible]

13. DECLARATION

I CERTIFY that all of the statements made in this document are true, complete, and correct to the best of my knowledge and belief.

Date _____ Signed _____
Alien (Delete one) Agent [illegible]

IF THIS FORM IS SUBMITTED BY AGENT OF ALIEN, GIVE AGENT'S COMPLETE ADDRESS _____

Exhibit 1 to Molson

C.A. 688-67

UNIVERSITY COLLEGE of SWANSEA.

STATEMENT CONCERNING HELENA HILDA BUTTERFIELD.

University Number: 28,123.

Date of admission to College: October 1, 1947.

Date of leaving College: June 30, 1951.

Particulars of courses pursued and completed:

Session.	*Courses pursued*	*Remarks.*
1947-48	Greek (Subsidiary)	Passed examination.
	English (Subsidiary)	Passed examination.
	History (Subsidiary)	Passed examination.
	Philosophy (Intermediate)	Passed examination,
1948-49	English (Final)	Failed examination.
	History (First Year Honours)	
1949-50	English (Final)	Passed examination.
	History (Final)	Passed examination.
1950-51	History (Second Year Honours)	Passed examination, Class II, Division 2.

(During the Session 1950-51 Miss Butterfield held the office of Vice-President of the Students' Representative Council).

Degrees, etc., gained and date of award:
Qualified for the B.A.(Pass) degree of the University of Wales, June, 1950.
Admitted to the B.A. degree of the University of Wales with Second Class, Division 2, Honours in History July 21, 1951.

Date: October 22, 1965.

Registrar.

30250—CPM

Exhibit A. CA-688-67

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D.C. 20202

Date: Nov. 18, 1966

Ref.: Case No. 11999-NE

Dear Mr. Drummond:

As requested by you on Nov. 18, 1966 we are providing the following advisory interpretation of foreign credentials pertaining to Miss Helena Hilda Butterfield's education in Wales.

In terms of education in the United States, the records submitted indicate that the applicant has the approximate equivalent of

___ completion of grade ____ of the elementary-secondary program

___ high school graduation

___ high school graduation plus

__x__ an undergraduate degree

___ Other:

__x__ Remarks: Miss Butterfield's B.A. degree with Second Class Honours from the University of Wales dated July 21, 1951 is comparable to a 4-year bachelor's degree in the U.S.

Additional factors which you may wish to take into consideration for possible modification of this advisory interpretation in terms of placement are: (1) proficiency in English, (2) demonstrated subject matter competence, and (3) the relationship between the program completed and your requirements for a specific program of study or certification.

We are returning to you the records submitted.

Sincerely yours,

Margaret L. Kiang

Research Assistant, Western Europe
Comparative Research Branch
Division of Higher Education Research
Bureau of Research

OE 6013 (7-66)
FORMERLY OE 3025

Mr. Stacy

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Washington, D. C.

REFER TO THIS FILE NUMBER
A13 132 257

Miss Helena Hilda Butterfield
1743 18th Street, N. W.
Washington, D. C. 20009

Dear Miss Butterfield:

Please come to the office shown below at the time and place indicated in connection with an official matter.

OFFICE LOCATION	Global Building 1025 Vermont Avenue, N.W. Washington, D. C. Room No. 820 Floor No. Eighth
DATE AND HOUR	Tuesday, December 27, 1966, at 9:30 a.m.
ASK FOR	I-140 adjudicator.
REASON FOR APPOINTMENT	Your pending petition to classify preference status on basis of profession or occupation.
BRING WITH YOU	This letter.

It is important that you keep this appointment. If you are unable to do so, notify this office at once, using the reverse side of this letter, and we will make another appointment for you. Bring this letter with you.

Very truly yours,

Lewis D. Barton
DISTRICT DIRECTOR

Form G-56
(Rev. 2-20-64)

GPO 883-342

MEMORANDUM FOR THE FILE A13 132 257

Exh 1

Interview conducted December 27, 1966
Helena Butterfield
Present: ADD/TC D. L. Drummond, I.I.'s Sewall and Guyant

Mr. Drummond stated that subject's financial situation would be taken into consideration as to the adjudication of the case and that her financial ability to start her proposed organization was now to be considered.

Subject replied that seller of building involved in present litigation had slandered her character and requested that since she believed he had violated their contract she would ask the courts to rule that contract should be reinstated as originally agreed upon.

Subject was sworn in and agreed to present testimony concerning her occupation and financial history under oath. She was questioned at length regarding the operation, financial and otherwise, of her schools in London and Rome and also in regard to the cultural foundation she has operated in the United States. She was also asked about a series of unpaid debts totaling close to $10,000, presently owed by her to many concerns in this country. Subject was evasive, verbose, and vague in regards to most of the questions asked of her. She denied that she was a poor financial manager as is evident from a review of the information contained in the file about her financial operations. She presented, in my view, a series of rationalizations to account for her past failures and blames ill-fortunes, accidents, illnesses, and bureaucratic regulations and delays as the reasons for her constant inability to succeed in her endeavors.

She stated that the schools she operated in London and Rome, Italy, had to be closed either because of unforseen accidents or poor financial situations. When questioned about some of the numerous debts owed by her to persons and concerns both in the Washington, D. C., area and California, she stated that these debts would have been taken care of had she only been able to complete the real estate transaction agreed to between Mr. William Gazelle and her and blamed Mr. Gazelle for all her present financial straits. When it was pointed out to her that some of these debts were over three years old she then blamed her inability to work because of immigration regulations and the fact that the American Consul, who had originally issued her an immigrant visa in Italy, had not informed her that although a British subject, she is chargable to the quota for India, the place of her birth. At the end of the interview she emphasised that she wished to have her "day in court" and clear her name from the charges and various allegations, as she termed them, made against her by Mr. William Gazelle.

Subject stated that she had sued him for $100,000 and that the court hearing was scheduled for January 15, 1967, at the United States District Court for the District of Columbia.

The interview evidenced that subject has never operated an accredited school, that she was unable to recollect for the financial transactions involved in rooming the schools and that they have never been within more than, if you please, a "fly by night operation," in the full sense of the term.

She has continuously over extended herself financially and has made commitments which, due to her managerial inability, she has then been unable to meet. This can be shown in the example of the first prize winner of a concert for young artists which she sponsored; the winner was earmarked for an award of $3,000 the amount subject hoped to derive for entry and registration fees for the contest. When participation was not as she had expected, she was then saddled with yet another financial set back. Insight of her statement to the country itself, it is the opinion of the undersigned that subject lacks any business sense and does not have any managerial capacity.

Subject was assured that she would be able to attend the court hearing relating to the real estate suit and counter suit scheduled for January 15, 1967.

C. E. Guyant
Immigrant Inspector

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
1025 Vermont Avenue, N.W.
Washington, D. C. 20536

REFER TO THIS FILE NO.
A13 132 257

Date: JAN 10 1967

Miss Helena Hilda Butterfield
1743 - 18th Street, N. W.
Washington, D. C. 20009

NOTICE OF DENIAL

Your Petition to Classify Preference Status of Alien on Basis of Profession or Occupation has been denied for the following reasons:

"SEE ATTACHED SHEET"

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

☐ Board of Immigration Appeals in Washington, D. C., on the enclosed Forms I-290 A.

☒ Regional Commissioner on the enclosed Form I-290 B.

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with a fee of $10. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

Sincerely yours,

Lewis D. Barton
District Director

Enclosure(s)

Form I-292
(Rev. 1-10-66)

#4

You have based your claim to Third Preference classification under Section 203(a)(3) of the Immigration and Naturalization Act on your qualifications as a teacher and your experience in opening and directing schools and cultural centers. You have stated that it is your intention to teach only in a school established and operated by you. You state that it is your intention also to establish and operate a cultural center.

The record in your case shows that while pursuing your profession in the United States since 1962 you have accrued a series of debts in California and in Washington, D. C. which are still outstanding. Local credit bureau records show that you owe a total of $3,851.16 to eight different firms in the District of Columbia. Three creditors have obtained judgments against you but the debts are still unpaid. The record shows that you failed to pay a $3,000.00 prize to the winner of a vocal contest you promoted in San Francisco in 1963. The record also shows that you have attempted to establish a school and cultural center in the United States and have failed to do so.

The phrase "for the purpose of performing", in Section 212(a)(14), clearly indicates that an immigrant alien within the contemplation of Section 212(a)(14) must establish a bona fide intent to engage immediately or in the foreseeable future in his profession or a related field (Matter of Semertian, Interim Decision 1627).

On December 27, 1966 at an interview at this office, you were appraised of the record of your failure to pay your debts and your failure to establish a school or cultural center in the United States. You were given the opportunity to show that you have the financial means to establish a school or a cultural center in the immediate or foreseeable future. You failed to do so.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Richmond, Virginia

688-67

FILE: A13 132 257 - Washington

March 3, 1967

IN RE: Petitioner - Beneficiary: Miss Helena H. Butterfield
1743 - 18th Street, N. W.
Washington, D. C.

IN BEHALF OF PETITIONER: Self-Represented

PETITION: To Accord Third Preference Classification under Section 203(a)(3) of the Immigration and Nationality Act, as Amended.

DISCUSSION: This case is before the Regional Commissioner on appeal from the decision of the District Director, who on January 10, 1967 denied the petition on the ground that the petitioner's record of unsettled financial obligations precludes a finding that she has the financial capability of realizing the establishment and operation of international cultural centers as set forth in the petition. On appeal, the petitioner submitted a brief and requested oral argument before the Regional Commissioner. The request was granted.

Petitioner is a 49-year-old single female, national of Great Britain born in India. She was admitted to the United States as a visitor for pleasure on January 8, 1962 and has never received an extension of her period of temporary admission. On January 19, 1966, the petitioner filed in her own behalf a petition for classification as third preference under section 203(a)(3) of the Immigration and Nationality Act, as amended, based on her qualification as a teacher and experience in opening and directing schools and cultural centers. In the petition, it was stated that petitioner would engage in the operation of international cultural centers promoting courses in languages, history, musical activities, and concerts.

In oral argument on February 15, 1967, petitioner stated that she has operated schools in London, England and Rome, Italy. She further stated that these schools were closed because of unforeseen accidents or poor financial situations. She also stated that in the United States she has used the trade name The Regent Foundation. The petitioner further stated that her current indebtedness is somewhat less than $30,000, and she is without capital with which to resolve her financial obligations.

The record discloses that the petitioner has since 1962 accrued a series of debts in California and Washington, D. C. which are still outstanding. Three creditors have obtained judgements against the petitioner which have not been settled. In 1963 the petitioner failed to pay a $3,000.00 prize to the winner of a vocal contest promoted by the petitioner in San Francisco, California. The record further discloses that the petitioner has been unable to establish cultural conters in the United States. All efforts to do so have resulted in increased indebtedness.

Section 203(a)(3) of the Act provides that visas shall be made available "to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States."

The petitioner seeks third preference classification as a member of the professions and to be eligible for such classification under section 203(a)(3) an alien immigrant must qualify for such classification. On the basis of the record, the petitioner has failed to establish that she is financially capable of establishing and operating international cultural centers in the United States as set forth in her petition.

After carefully considering all the evidence of record, together with petitioner's representations on appeal, we find the decision of the District Director to be correct and proper. The appeal will be dismissed.

ORDER: The decision of the District Director of Washington, D. C. is affirmed and the appeal of the appellant is hereby dismissed.

REGIONAL COMMISSIONER
SOUTHEAST REGION

International Educational and Cultural Organization

President & Founder
Miss Helena H. Butterfield, B.A. (Hons)

Patrons
Major General G.P.L. Weston, C.B., C.B.E., D.S.O.
Major General R. W. Madoc, C.B., D.S.O.

509 La Salle Building,
1028 Connecticut Ave., N.W.,
Washington, D.C. 20036

Tel. 296-8024

March 19th 1967

Mr. Reis,
Deputy Attorney General,
10th & Constitution,
Room 5119,
Washington, D.C.

Re: Immigration File A13 132 257

Fear Mr. Reis,

Further to my personal visit to your office last Friday, I am writing to thank you for giving me your time, and EARNESTLY request that you kindly do ANY THING within your power to stay the execution of this terrible deportation order for Thursday March 23 at 10 a.m., which if carried out would - in my opinion for what it is worth - be one of the gravest travesties or miscarriages of justice that the U.S. Immigration Authorities would have ever been guilty of effecting.

It would in fact be the final act of a most UNJUST COLLABORATION BETWEEN THE DEFENDANT AND HIS ATTORNEYS IN A CIVIL SUIT I HAVE FILED AGAINST HIM IN THE U.S. DISTRICT COURT, AND THE IMMIGRATION AUTHORITIES at a time which wast crucial to my entire future. This collaboration actually prevented me from giving my fullest attention to the civil action in the courts, on account of the MOST REFINED AND CIVILISED MENTAL TORTURE that any Government Agency can subject an alien to, as I have been subjected to for the past four months, having been under the constant threat of deportation since mid last November 1066, right on up till now.

The UTTERLY PARALYSING EFFECT OF THOUGHT AND ACTION this has constantly had on every move I have taken to-wards either settling my civil action, or applying myself to make a financial success of my business, or most important to me at this moment, to satisfy the Immigration regarding my third preference visa petition I filed more than one year ago, has been a SORE AGGRAVATION, completely unmerited.

I am giving details of the entire situation on the following pages.

Grateful to you for being willing to look into this matter for me, and expecting to hear from you shortly,

Yours sincerely,

International Educational and Cultural Organization

President & Founder
Miss Helena H. Butterfield, B.A. (Hons)

Patrons
Major General G.P.L. Weston, C.B., C.B.E., D.S.O.
Major General R. W. Madoc, C.B., D.S.O.

[illegible]
Washington, D.C. 20007
Telephone: 783-4600

COLLABORATION BETWEEN WILLIAM GAZELLE AND HIS ATTORNEYS

and

THE IMMIGRATION AUTHORITIES 1966 - 1967

To the exclusion of my peaceable pursuit of business and a financial success

A). To carry the expenses of my civil action against William Gazelle to rectify a grave injustice William Gazelle did to me by
1). obstructing me from receiving a school license
2). failing to sign the sales contract according to the written agreement

B). To satisfy the Immigration Authorities that I am able to establish an international educational and cultural center. in accordance with my application for a third preference visa petition.

---

1). In November 1966 I received the first notice of deportation subsequent to my filing for third preference, to be executed a day or two before Thanksgiving.

October - November William Gazelle's attorneys had tried unsuccessfully,
a). To apply for summary judgment to dismiss my suit.
b). To apply for an advanced trial
c). To apply for a pre-trial which my attorney opposed to take place until he had taken the defendant's deposition on or about 19th November 1966., as they had taken mine a week or so earlier.

Notice of this deportation was such a paralysing shock - nevertheless, realising the importance of showing the Immigration Authorities that I was engaged in the kind
a). of work which I had stated I could do, I set to work to open a School of languages Literature and History, and promote the cultural program I had always envisaged doing while I was at 1726 New Hampshire Ave., N.W. at my present location at 509 La Salle Building, 1028 Connecticut Ave., N.W.

b). Unaware - unquestionably through the overwhelming pressure I was under to stay deportation proceedings - that the taking of this deposition was important to his filing a motion for pre-trial, I believed that I could deal with the matter after Christmas, by which time I had hoped to have started my newsschool, since I knew his motion for advanced trial had been denied, there seemed no point in spending time and money on taking his deposition, when I needed it to develop a small school.

His attorneys however, immediately ~~took~~ seized this and interpreted it that I was deliberately delaying the trial and used it as a means to push the pre-trial and obtain the trial itself far in advance of when it should have taken place next October or thereabouts.

International Educational and Cultural Organization

President & Founder
Miss Helena H. Butterfield, B.A. (Hons)

Washington, D.C. 20007
Telephone: 783-4600

Patrons
Major General G.P.L. Weston, C.B., C.B.E., D.S.O.
Major General R. W. Madoc, C.B., D.S.O.

2). Early December 1966 I was required to give minute details regarding my academic qualifications and teaching experience, despite the University certificate and transcripts of records that I had furnished, that unquestionably William Gazelle's attorneys were using the Immigration Authorities to probe much information I had refused to give them at my deposition when they asked me if the Honours after my degree was an 'honorary' degree or an earned on, because I deemed it quite irrelevant to my suit against him.

Every step of their tactics has been to try and prove me a 'charlatan', even as William Gazelle is in his representations to everyone that hex is an attorney which he is NOT, having read law for about 18 months at the C olumbia Law School in New York, and he has no academic qualifications whatsoever.

3). December 27 1966. Despite the definite understanding that was given me at the last time I was required to go to the Immigration Office, that the next time I would be asked to attend, would still be in connection with further documentary evidence about my teaching experience, nevertheless on this next occasion I went up, not a word was said about that matter, instead I was put through a gruelling two hour cross-examination about my financial details covering practically the last 15 years.

Once again the questions that were put to me, were often identical with those that had framed by William Gazelle's attorney when he took my deposition, many of which I refused to answer because like the questions they put to me about my academic qualifications, they were irrelevant to my suit against him, which was for 'specific performance' of a sales contract, dealing with real estate, and NOT my teaching ability, or my former educational attainments

In order howver, to exonnerate himself for failure to sell me his property, William Gazelle has brought some most serious allegations against me claiming that I made false representations both to him and the D.C. Zoning Board of Adjustment, and they have been urging the Immigration Authorities to deport me to prove that I was an undesirable person to have in this country. Deportation would indeed him correct and leave me discredited in the eyes of the community, the city officieals, and the courts.

It is strange that William Gazelle filed suit against the lady he bought the property from in November 1964 and sued her for $22,000 damages, and then settled for $1,750 this past October or November 1966. He appears to have no compunction about bringing these very serious allegations against ladies.

4). January 5 - 10 1967 Having gained their ends to advance the trial to immediately after the New Year, within less than two weeks from the obtaining it to be put on the calander, there was very little time in which to get throughly prepared. While they have been pushing and pushing at every direction to throw out my suit, I have been battling Immigration deportation, trying to re-establish myself, and cope with the court proceedings all at the same time.

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Further, besides the fact that my attorney had to rush back from a New Year's vacation to appear in court, there were serious differences between us asto procedure and strategy in the trial, and twice he asked to withdraw and was e refused, and once I asked that he be allowed to withdraw, and was refused.

Consequently, much evidence that I regarded as very important to the case was just not introduced because not only was there no time to have it all ready much was left out by my attorney who did not wish to introduce it, or who rather did not regard it necessary to do so. As far as I personally concerned, under the circumstances, I do not feel that I was therefore represented as effectively as I might have been, and this is the main basis for my appeal to the court decision which was adverse against me.

6). January 10 1966 The same day, the Immigration Authorities accepting the verdict as confirmation of the necessity to deport me, set another date for deportation with the option to appeal the decision to the Regional Commissioner.

5). January 25 or thereabouts I went personally to see Mr. Rice for oral argument for about 20 minutes, and until he gave a decision, he said I could carry on with my work, pamphlets about which I left with him at his office.

Since then I have been pursuing as vigorously as possible, the development of an educational and cultural work, with commitments to numerous people, beyond the date set for deportation, which in the name of all that's humane I ask, is it RIGHT, IS IT JUST THAT I SHOULD BE SUBJECTED TO ALL THESE OVERWHELMING OBSTRUCTIONS TO THE PEACFUL PURSUIT AND DEVELOPMENT OF A WORTHWHILE ENDEAVOUR WHICH BEARS COMPARISON WITH THE NEW NATIONAL COUNCIL OF ARTS PROJECT FOR YOUNG ARTISTS.

There is an agony that is INDESCRIBIBLE, especially when the Regional Commissioner himself, perhaps unwittingly, or perhaps with the thorough knowledge for all I know, of ~~the~~ William Gazelle's promptings, uses phrases in his written order for denial of the District Director's decision that they have been harping on throughout the taking of my deposition and the court trial, ie that th e use of Regent Foundation is a deliberate attempt to deceive the public, whereas I have never once asked a single soul for one cent donation, but rather have looked forward to the day when I would be giving large grants to others, even as the Ford Foundation does. An attorney in Oakland confirmed to me that there was no illegal or fraudulent impression conveyed if I should use the name as my busines name, as I have openly doen now for over two years in Washington.

7). March 19 1967 . my case is pending in the Appeal Court on the grounds that I was denied the constitutional right to be represented by counsel of my choice, after my former attorney was refused to withdraw from the case, and I am prepared to appeal this to the Supreme Court if necessary, because I am convinved that I was dome a great injustice by the trial being rushed through in the manner it was, while I was under such heavy pressure of deportation at the instigation o f the defendanT's attorneys and collaboration with the Immigration Authorities.

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DEPORTATION ON MARCH 23, which would deprive me of all recourse forever to receive fullest opportunity for re-trial, and would constitute the peak of INJUSTICE done to me both by William Gazelle and the Immigration Authorities with whom he has collaborated so successfully thus far in HARRASSING ME TO POINT OF SORE AGGRAVATION.

I certainly did not come to the U.S. to be ruined and destroyed in character reputation and prestige, which in the final analysis is far more important and vital than damage to property, and especially by a former alien, who subsequently ~~filed~~ to becoming a U.S. citizen, filed personal bankruptcy for $30,000. and is currently more heavily in debt than I have ever been.

I DO URGE THAT HIS FINANCIAL GAIN SHOULD BE MY LOSS AND ENTIRE FUTURE IN THE UNITED STATES WHERE I HAVE NOW ALREADY BEEN FOR OVER 5 years, AND WHERE I WISH TO LIVE ON A PERMANENT BASIS EVEN HE DOES.

I DO ALSO URGE THAT I DO NOT BE DENIED THE BASIC RIGHT OF SELF-DETERMINATION TO GET OUT OF WHATEVER LOW FINANCIAL EBB IN WHICH I FIND MYSELF AT PRESENT, EVEN AS ALL U.S. CITIZENS WERE OBLIGED AT THE TIME OF THE GREAT DEPRESSION THROUGH FORCE OF CIRCUMSTANCES THAT CAME AGAINST THEM OVERWHELMINGLY. IN MY PRESENT SITUATION, THE FORCE OF CIRCUMSTANCES WERE LONG AND UNFORSEEN DELAYS IN RECEIVING A SCHOOL PERMIT, AND [illegible] A PERSON WHO LACKED MORAL INTEGRITY TO STAND BY AN ORAL AGREEMENT MADE BEFORE A THIRD PARTY, WHICH NEED TO BE PROVED IN THE COURTS IS AS VALID AS A WRITTEN WORD.

P.S. Clipped the Lebanese girl embarrassing photograph appeared in Today's Washington Post who is to deport in spring as please emphasize police record is unusually clean, I have all the right photograph [illegible] that we should not be deported. 'deportable' is ridiculous to say the least.
PLEASE HELP ME MR. RICE.

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DETAILED FACTS ABOUT THE THIRD KISK PREFFRENCE VISA PETITION 203 (a)(3)

1). In November or December 1965 I filed a third preference visa petition.

2). In Jamary or February 1966 I urged consideration of my petition, but was advised that the person handling it, a Mr. Coffin had been transferred to Chicago, and that I should wait until another person could take it over.

3). In March 1966 I notified the Immigration Office of my intention to purchase the property at 1726 New Hampshire Ave., N.W., where I intended to open a large international educational and cultural center, subject to the redeiving of a license from the D.C. Zoning Board of Adjustment and License Departments. No steps were taken regarding my petition, as the Immigration Office was being moved to Vermont Avenue.

4). On April 15 1966 I entered into a purchase agreement with the owner of= the property, William Gazelle and took it over, managing it as an International Guest House for 50 residents, while applying for a license to open a school. As record owner of the property, William Gazelle was required by the D.C. authorities to sign all applications and documents relating to this license. I received his full co-operation from January 1966 - end of June 1966.

5). In June 1966 I finally heard from the Immigration Office who wished me to furnish further documentary evidence regarding my application for third preference. I notified them that I would furnish these, and that while I was waiting for a School permit, I was operating the property at 1726 New Hampshire as a guest-house.

6). Meanwhile, through long and unforeseen -(and again in my opinion, for what it is worth, COMPLETELY UNNECESSARY and therefore BITTERLY FRUSTRATING -) delays from ~~January~~ - end of July, instead of till May 1 as I had anticipated,, I was unable to make certain payments to the owner, who in turn WAS FULLY AWARE of my inability to make those payments without the right to open a school, which would bring in much more income than a mere boarding-house ever could , and which was never my intention to operate as a livlihood permanently. The evidence from the agreement between us testifies to the fact that I had anticipated receiving the license by May 1 the latest, since the payments I should have made him was small as $500 on May 5, and increasing to $1,000, then $8,000 on July 1, $15,000 ob August 1, then $30,000 by October and the balance of $29,000 odd by Novemner 1.

His continued co-operation with me right up till the end of June in applying for the license , and his oral agreement before a witness, the Real Estate Agent to postpone receiving the payments ~~xxxxxxxxxx~~due before July 1 to August 1 and August 1 payment to September 1 and at the same time sign the sales contract according to the written agreement of April 15 is the MAJOR POINT OF MY ENTIRE CIVIL ACTION AGAINST WILLIAM GAZELLE at this time.

International Educational and Cultural Organization

President & Founder
Miss Helena H. Butterfield, B.A. (Hons)

Patrons
Major General G.P.L. Weston, C.B., C.B.E., D.S.O.
Major General R. W. Madoc, C.B., D.S.O.

~~[illegible]~~
~~[illegible]~~
~~Washington, D.C. 20007~~
~~Telephone: 783-4600~~

Facts about t hird preference visa petition

contd.

7). In August 1966 I brought this Civil Action against William Gazelle, because just at the end of July within less than 4 weeks of his final act of co-operation with me to-wards receiving the school license, and within less than 2½ weeks of his final agreement to postpone receiving certain payments on August 1 as described above, he DELIBERATELY OBSTRUCTED ME FROM RECEIVING THE SCHOOL License, by refusung to sign the building application permit, so that the contractor could bring the building up to the specifications of the 1956 Building Code for schools, ~~Actually, about 90% of the [illegible]~~ saying that he did not wish a lien placed upon the building, in the event of my failure to pay for thier cost. Actually about 90% of these citations were required for a boarding-house, which he had never put right. Nevertheless he used it as an excuse to deprive me of the fruits of opening a school for which I had worked long and arduously, with total costs up to $1,200 involved.

a).

b). He refused to sign the sales contract stating that I had violated the contract by non-payments of monies due before July 1, totally repudiating hisoral agreement to postpone the date to August 1, which put him in the position of being the violater when he refused to accept from me any money I offered him by that date. The reason was that he had by now received an offer to sell for $250,000 or $25,000 more than he should have had from me, and a total cash deal, which meant that he would have $110 or difference between the mortgages and the purchase price, all in cash at once , instead of $85,000 from me in instalments. For this far more attractive financial deal, he completely lacked moral integrity and broke me to pieces, for not only did all my plans for opening a school utterly grounded, but $18,000 worth of brand new furniture I had taken into the building on a basis of instalment payments was ruined, as was also the tremendous good-will I had built up during the previous 5 months with over 300 U.S. and International visitors to the nation's capital. It was a grevious damage he did to me, and one that I cannot but seek redress for in the courts.

8). In September 1966 he obtained re-possession of the building, because I was unable to post $30,000 bond to remain in possession of it, till them matter should come to trial.

9). On October 4, he succeeded in evicting me, and on that inquitous day he told me personally, "I'm going to see you get sent out of the country - Baby....."

10). From that day to this he and his attorneys have succeeded in assiduously collaborating with the Immigration Authorities to have me deported, because once I am out of the way, the title to the property is cleared, and they can sell it for $250,000.

In the meantime, I haveSUFFERED IMMEASURABLY. DEPORTATION at this time would be the ACME OF HUMILIATION - ruination of business, reputatation, prestige as well as financial loss, and the ability to make a comeback from any former financial difficulties I might have had prior to that time. To be deprived from having the FULLEST RECOURSE TO THE COURT FOR REDRESS WOULD BE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

688-67

HELENA HILDA BUTTERFIELD
1028 Connecticut Avenue, N. W.
Suite 509
Washington, D. C.

Petitioner

v.

Civil Action No.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES
Serve Attorney General of the United States
and Lewis D. Barton, District Director
Immigration and Naturalization Service
1025 Vermont Avenue, N. W.
Washington, D. C.

Respondent

PETITION FOR REVIEW OF DENIAL OF IMMIGRATION CLASSIFICATION

Petitioner Helena Hilda Butterfield comes before the Court with the following petition:

1. Petitioner is an alien resident of the District of Columbia residing at 1028 Connecticut Avenue, N. W., Suite 509, Washington, D. C. This Court has jurisdiction under Section 106 of the Immigration and Nationality Act, 66 STAT. 163.

2. Petitioner entered the United States January 8, 1962 on a visitor's visa as a National of Great Britain, born in India while her father was a Gazetted Officer in the Survey of India, a British Civil Servant.

3. On January 19, 1966, Petitioner filed with the Immigration and Naturalization Service a petition for classification as third preference under Section 203(a)(3) of the Immigration and Nationality Act, as amended, based on her qualification as a teacher and experience in opening and directing schools and cultural centers.

4. By order dated March 3, 1967, the Regional Commissioner, Southeast Region, Immigration and Naturalization Service, ordered affirmance of a decision of the District Director of Washington, D. C., denying petitioner's petition and dismissing her appeal therefrom; (A copy of said order is attached hereto as Exhibit A.); and respondent has ordered petitioner to appear in its office for deportation at 10:00 A. M. March 23, 1967.

5. The order of the Immigration and Naturalization Service, is arbitrary and capricious and is not supported by reasonable, substantial, and probative evidence for the following reasons:

(a) The administrative record clearly shows that petitioner is not and has not been a public charge to the United States or the District of Columbia and is fully capable of developing and establishing her professional work if not obstructed by the order of deportation.

(b) That the administrative record clearly shows that petitioner has established a bona fide intent to engage immediately in her profession as required by Sec. 212(a)(14) of the Act.

(c) That the administrative record clearly shows that petitioner has established the Regent Foundation, international educational and cultural organization, and is currently offering educational and cultural courses at said foundation at Suite 509, 1028 Connecticut Avenue, N. W., Washington, D. C.

(d) That the administrative record clearly shows that petitioner is currently conducting the Regent Competition Concerts consisting of 26 concerts at the Washington Hilton Hotel and Constitution Hall for 36 young professional artists of piano and voice from leading schools and conservatories of music and university

colleges and that said competition is being judged by teachers from leading music schools and recognized music critics.

(e) That the administrative record clearly shows that in addition to her professional and educational activities, petitioner operates a guest house at 1743 - 18th Street, N. W., Washington, D.C.

(f) That the administrative record clearly shows that petitioner is a party in Butterfield v. Gazelle, Civil Action No. 2243-66, in this Court, and in Butterfield v. Gazelle, No. 20793 in the United States Court of Appeals for the District of Columbia Circuit arising out of a real estate transaction responsible for petitioner's temporary financial difficulties, if any, and that petitioner's continued residence in the District of Columbia is essential to the successful termination of said litigation.

(g) That the administrative record clearly shows that immediately prior to the respondent's inception of its unfavorable treatment of petitioner, one William Gazelle, party to the aforesaid litigation, threatened petitioner in substantially the following language: "I am going to have you sent out of the country, Baby."; that respondent's proceedings against petitioner were patterned after the said William Gazelle's attorney's conduct of the litigation, were instigated and promoted by the said William Gazelle and were used as a tool for the frustration of petitioner's peaceful prosecution of said litigation and development of her professional and educational pursuits.

(h) That the administrative record clearly shows that the said William Gazelle has used the Immigration and Naturalization

Service as a means of depriving petitioner of her contract rights and of enriching himself at her expense.

(i) That the administrative record clearly shows that petitioner is qualified and capable of pursuing her professional and educational activities for the substantial benefit of the national economy, cultural interests, or welfare of the United States.

6. Petitioner alleges that the complained-of action of the respondent violates the Immigration and Nationality Act and the Constitution of the United States as a deprivation of personal and property rights without due process of law.

WHEREFORE, petioner prays that this Honorable Court:

(1) Review the order of deportation against petitioner.

(2) Enjoin the respondent, temporarily and permanently, from deporting petitioner and mandatorily enjoin respondent to grant petitioner third preference immigration classification.

(3) And for such other and further relief as to the Court seems proper.

Respectfully submitted,

Helena Hilda Butterfield

Helena Hilda Butterfield
In Proper Person
1028 Connecticut Avenue, N. W.
Washington, D. C. 20036
296-8024

HELENA HILDA BUTTERFIELD,

Plaintiff,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

Civil Action
No. 688-67

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

By Order entered June 19, 1967, this Court held in abeyance further proceedings in this case pending Court of Appeals disposition of a motion seeking consolidation and disposition in that Court of this case with a similar petition filed in the Court of Appeals. On February 20, 1969, the Court of Appeals held that the United States District Courts have exclusive original jurisdiction to review the type of matters presented by plaintiff herein and denied the motion. Butterfield v. I.N.S., 409 F. 2d 170 (C.A.D.C.). That judgment having become final, the instant case is in a posture to proceed to determination.

Accordingly, defendant by his undersigned attorneys, moves the Court to dismiss the complaint for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment on the ground that there is no litigable issue and defendant is entitled to judgment as a matter of law.

Incorporated herein are the certified Immigration and Naturalization

Service records relating to plaintiff (marked Government Exhibits A, B, C, D, E, and F).[1/]

In support hereof, a statement of material facts and memorandum of points and authorities are submitted.

Respectfully submitted.

WILL WILSON
Assistant Attorney General,
Criminal Division.

PAUL C. SUMMITT,
Attorney
United States Department of Justice.

Of Counsel:

Thomas A. Flannery,
United States Attorney.

1/ Since the record is voluminous and not paginated consecutively, for the convenience of the Court defendant is appending to the Statement of Material Facts copies of the Decision of the Regional Commissioner (App. A), the Decision of the District Director (App. B), the Petition to Classify Preference Status of Alien on Basis of Profession or Occupation (Form I-140) (App. C), and the Statement of Qualification of Aliens (Form ES-575A) (App. D).

HELENA H. BUTTERFIELD

Plaintiff

v.

C.A. No. 688-67

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES

Defendant.

FILED

NOV 21 1969

ROBERT M. STEARNS, Clerk

PLAINTIFF'

MOTION TO DENY DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Comes now, Helena H. Butterfield, Plaintiff, pro se, and moves the Court to deny Defendant's motion of November 5 1979;

A. To dismiss this action on grounds that she has failed to state a claim upon which relief can be granted; or in the alternative,

B. For summary judgment on the grounds that there are no litigable issues, and that Defendant is entitled to judgment as a matter of law.

A. PLAINTIFF'S OPPOSITION TO DISMISS

Plaintiff has very clearly stated her claim for which relief can be granted in the facts enumerated in Point 5 of her complaint, summarised as follows:-

a). Plaintiff is not, nor ever has been a public charge to the United States. She is still fully capable of developing her educational and cultural centre of only she could be released from the perpetual harassment caused her by INS threats of deportation, and interminable litigation to secure relief from deportation, through obtaining third preference classification.

b). Plaintiff clearly established a bona fide intent to engage immediately or in the foreseeable future in her profession, as required by Sec. 212 (2) (14) of the Act 8 U.S.C., after the filing of her third preference petition under Sec. 203 (a) (3),

by entering into a contract to purchase a property to be used as a school. She complied assiduously with every requisite of the D.C. Dept. of Licenses and Inspections to obtain a school permit, until she was ruthlessly and FRAUDULENTLY OBSTRUCTED from receiving it on the very threshhold of doing so, by William Gazelle, owner od the said property.

C& d). Plaintiff is still engaged in her professional work of teaching.

f). Plaintiff was a party to C.A. No. 2243 1966, Butterfield V Gazelle in the District of Columbia, and No. 20,793 in the Court of Appeals arising out of William Gazelle's fraudulent "BREACH OF CONTRACT" resulting in Plaintiff's 'financial inability' to open her school.

Plaintiff now places on record that her action against Wm. Gazelle for TOTAL DISRUPTION of her work was inextricably hindered by INS threat of deportation on November 15 1966, notice of which arrived the very week he filed readiness for trial. It was a source of DEEPEST HARASSMENT right up till the date of trial set for January 5 1967, and which largely went against her for lack of preparedness because of pre-occupation with INS and deportation. Leter, as a result of the financial inability caused her by Wm. Gazelle, she was unable to afford a lawyer, and was compelled to act pro se. In this capacity as a 'legal novice' which she still is, she was further bitterly frustrated by INS sheer harassment and order to report for deportation on March 24 1967, at the very time she was engrossed pro se against Wm. Gazelle in the Court of Appeals. She unflinchingly avers her failure to comply with the Rule requiring her to file her concise statement of points by a certain time, to the grievous disturbance she suffered in filing Court action against INS to stay deportation. Her appeal for $100,000 damages was dismissed for lack of prosecution. One of three judges opposed the dismissal. Plaintiff's appeal to the Supreme Court likewise fell on 16 Jan 67. at the time INS requested consolidation of her two suits, and summary judgment.

1).

2).

3)

g). INS unfavorable treatment of Plaintiff was instigated by Wm. Gazelle. The Dec. 27 1966 interview with INS followed the pattern on his attorney's taking of her deposition. The report of it, which was sent to the Regional Commissioner, which was also the basis of the denial of Plaintiff's third preference petition, confirmed Wm. Gazelle's representations to INS, when he told her "I'm going to have you sent out of the country - Baby "... the day he was able to wrest the property back from her. His reason for this, was because Plaintiff's suit against him, No. 2243-1966 was causing a cloud to the title of the property which he was negotiating to sell to a Roman Cathilic Organisation of Jesuit priests for $250,000 ALL CASH. His affidavit of Dec. 1 1966 clearly indicates he was using INS as a tool to deprive Plaintiff of her permanent residence, in order to enrich himself by $25,000 more than Plaintiff was paying for the property, and for the far more enticing proposition of ALL CASH compared with the assuming of two mortgages and the paying of a cash difference of $80,000 by Plaintiff over a period of six months. INS however, NEVER INVESTIGATED ANY OF THIS EXTENSIVELY as claimed.

Plaintiff's claim to relief, may be summed up as follows:-

1). She has never been a public charge to the United States.

2). She established bona fide intent to engage immediately in her professional work, by applying for a school permit.

3). Plaintiff was FRAUDULENTLY OBSTRUCTED from receiving her school permit, and therefore should not be deprived of her third preference for 'financial inability' caused by Gazelle.

4). Wm. Gazelle used INS as a tool to have Plaintiff deported, in order to enrich himself.

5). INS unfavorable treatment of Plaintiff stemmed from Wm. Gazelle malicious misrepresentations to INS regarding Plaintiff, which INS NEVER INVESTIGATED EXTENSIVELY, basing her denial to

of thrid preference on fincial situations that had no bearing on the issue at hand WHATSOEVER, which was capricious denial.

IN BRIEF, Plaintiff's claim to relief from deportation, through the granting of her third preference rests on the grounds that, SHE OUGHT NOT TO BE DENIED HER THIRD PREFERENCE FOR FINANCIAL INABILITY WHICH WAS FRAUDULENTLY CAUSED BY WILLIAM GAZELLE, WHICH INS NEVER EXTENSIVELY INVESTIGATED AS CLAIMED, ~~BUT WHO~~ WHICH INS RATHER ABUSED ITS DISCRETION IN DENYING PLAINTIFF HER RECLASSIFICATION, BEING GRAVELY INFLUENCED BY WILLIAM GAZELLE'S MALICIOUS MISREPRESENTATIONS TO INS REGARDING HER.

B. PLAINTIFF'S OPPOSITION TO ALTERNATIVE SUMMARY JUDGMENT ON GROUNDS OF LACK OF LITIGABLE ISSUES

1). Plaintiff having stated her claim to relief rests on the injusti of being deprived of her third preference visa for financial inability caused by Wm Gazalle, the litigable issue that arises is whether INS was 'arbitrary and capricious' in depriving her of her third preference on such grounds.

2). INS denied Plaintiff third preference under Sec. 203 (a) (3) which provides that :-

"Visa shall be made available ... to MEMBERS OF THE PROFESSIONS....."

At no time has INS ever made reference to lack of Plaintiff's professional qualifications, and according to INS own Exhibit F page 2, it is stated;

'The Act defines the term "profession" to "include, but not be limited to architects, engineers, surgeons, lawyers, physicians, and TEACHERS IN ELEMENTARY AND SECONDARY SCHOOLS COLLEGES, OR ACADEMIES OR SEMINARIES. 8 U.S.C. p. 1101 a 32

Plaintiff holds a B.A. Honours degree from the University

of Wales, which in G.B. is regarded as higher than an ordinary B.A. degree. She is well qualified to teach in elementary, secondary schools, in colleges and academies ~~ex~~. As a self-employed teacher she taught over a period of ~~years~~ years from 1951 - 1961, from Kindergarten through elementary and secondary and high school levels to College level. She taught literally hundreds of foreign students privately or in class in her Schools of Languages in Lonflon and Rome , entering them for the Lower Certificate and Proficiency examination of Cambridge University, the latter examination made holders of that certificate eligible to enter a British University, without having to take the entrance examination specially, in English.

Later in the United States, Plaintiff made application to teach as a substitute teacher in Berkely Calif, in secondary and high schools, but her application was turned down on the grounds that only U.S. citizens were eligible to teach in Govt. schools. Subsequently she applied to a privately owned Junior College of Arts and Crafts in Oakland, but again her application was turned down only because the Principal could not state as INS required that the job could not be filled by a U.S. citizen. It was given to a graduate student at Berkely University.

The alternative litigable issue that arises is whether INS in denying Plaintiff a MEMBER OF THE PROFESSIONS, was arbitrary and capricious, or was there a MISUNDERSTANDING OF THE LAW. and if so, should the administrative determination be reversed, according to INS Points and Authorities page 2.

3. INS in its Points and Authorities claims that the Court's role is that of a reviewer rather than that of an original factual fact finder, and that unless there is presented a substantial claim to U.S. citizenship, the scope of the Court ~~is~~ to review the administrative determination denying Plaintiff her third preference is limited to Agency record underlying the challenge of the Administrative determination and that the Court DOES NOT ~~EXXE~~ TRY THE FACTUAL ISSUES DE NOVO.

The litigable issue that arises is whether Plaintiff's co.
rights granted her by Congress which permits any person ... the
to have ' full and due process of law', is being violated , by
virtue of not being a U?S? citizen., and whether Congress' grant
~~for~~ to aliens ~~to~~ for review by the courts for discretionary relief is
being curtailed by review of ~~only~~ INS records ONLY which Plaintiff
claims IS RIDDLED WITH GRAVE INJUSTICES.

4. INS in its Points and Authorities claims that abuse of discretio
~~any~~ is constituted only if " the determination were made without
a rational explanation, inexplicably departed from established
policies, or rested on an impermissible basis such as invidious
discrimination against a particular race or group." Plaintiff o
or individual.

For very definitely, the litigable issue that arises is
whether INS has not practised EXCEEDINGLY INVIDIOUS DISCRIMIN
ATION AGAINST PLAINTIFF , stemming from the malicious mis-
representations made by Wm. Gazelle to INS against her.

This entire motion is a vehement attack against Plaintif
as illustrated by the wild charges INS has made with reference t
1). Plaintiff has deliberately and recklessly incurred debts of
$30,000, AND MANY OF HER FINANCIAL TRANSACTIONS ARE
BORDERING ON FRAUD.
2). Plaintiff utterly challenges INS claim to EXTENSIVE INVES
TIONS, concerning the circumstances which pervented her
from opening her school. Rather INS was deeply influenced
by Wm. Gazelle's malicious misrepresentations to INS con-
cerning her. INS NEVER ASKED HER ONCE FOR FACTS AND
FIGURES ABOUT HER PROPOSED SCHOOL AND HER ABILITY T
OPERATE IT SUCCESSFULLY HAD SHE NOT BEEN FRAUDULEN
OBSTRUCTED BY WM. GAZV LLE. IT BASED ITS DENIAL ON AN
INTERVIEW TO WHICH PLAINTIFF CAME TOTALLY UNPREPAR
a). TO GIVE DETAILED FACTS AND FIGURES, DEC. 27 ~~xxx~~ 1966

was the most FRAUDULENTLY CONDUCTED INTERVIEW EVER STAGED by a Govt. Agency. For 2 and 1/2 hours she was gruellingly questioned about her financial affairs for the previous fifteen years, In the subsequent report sent to the Regipnal Commissioner, INS did not make one reference to her financial situation during the previous six months at 1726 New Hampshire Ave. N.W., where Plaintiff housed 300 US and International Federal Govt. A.I.D. participants, handling $20,000, while applying for her school permit..

b). Plaintiff further challenges as persecutory, the report that came from the Regional Commissioner after the interview of Feb. 15 1967, which like INS report (of the Dec. 27. 66 interview) to the Commissioner is utterly distorted. She never said her debts were somewhat less then $30,00

She intends to file an affidavit giving FULL DETAILS WITH DOCUMENTARY EVIDENCE SUPPORTING ALL THESE STATEMENTS.

c). INS allegation that Plaintiff has maintained herself in the US over a long period of time IN DEFIANCE OF THE LAW THROUGH EXTENDED LITIGATION AND MULTIPLE PRIVATE BILLS is grievously prejudicial and constitutes invidious discrimination. Plaintiff will also supply FULL DETAILS of her entire sojourn in the United States since January 8 1962 which will vindicate her, as having always sought the protection of the law.

d). Finally, INS now seeks to limit the Court to try the factual issues de novo. It reflects desire to conceal examination of the record, which Plaintiff holds is RIDDLED WITH INJUSTICES. and is thereby gravely discriminatory in character.

To sum up the litigable issues.

1). Whether INS denial of Plaintiff's third preference on grounds of 'financial inability' caused by Wm. Gazelle, is a violation of her constitutional right to permanent residence in the US.

2). The alternativr litigable issue arises from whether INS was arbitrary and capricious in denying Plaintiff, A MEMBER

OF THE PROFESSIONS a third preference under Sec. 203 (a) (3) of the Act, or whether it was a MISUNDERSTANDING OF THE LAW.

3. Whether Plaintiff's right to ~~due~~ full and due process of law by Congress is being violated by INS claim to judicial review of this Court being limited to review of INS record and determination alone, without the Court trying the factual issues de novo, on grounds that no presentation ~~to~~ of US citizenship is being made by Plaintiff.

4. Whether the administrative determination should be reversed on grounds of invidious discrimination having been practised against Plaintiff, since INS has gravely defamed her character and persecuted HER both in this motion and in its prosecution of her petition. INS allegations as follows:- read,

a). Plaintiff has deliberately and recklessly ~~incurred~~ incurred $30,000 debts/ MANY OF THESE TRANSACTIONS WERE BORDERING ON FRAUD.

b). INS completely failed to make EXTENSIVE INVESTIGATION, and based its denial on arbitrary and capricious reasons which had no bearing WHATSOEVER on the circumstances of the opening of her school at 1726 New Hampshire Ave. N.W. Washington, D..C. She challenges in particular the reports of the two interviews of Dec. 27 1966 and Feb. 15 1967, as being utterly unrepresentative of true facts. referred to in INS motion of November 5 1969.

c). INS allegation that Plaintiff has maintained herself in the US IN DEFIANCE OF THE LAW, is gross invidious discrimination.

d). INS present attempt to obstruct this Court to full and penetrati examination of the administrative record and to try the factual issues de novo, constitutes grave discrimination against Plaintif

WHEREFORE

Plaintiff having stated her claim to relief, and the litigable issues that arise, therefore moves the Court to deny INS motion to dismiss or alternatively for summary judgment, and to order a fair and open trial, with FULL EXAMINATION of all evidence in open Court.

Respectfullu submitted, Helena H. Butterfield, Plaintiff, Pro

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HELENA HILDA BUTTERFIELD, Plaintiff vs THE ATTORNEY GENERAL OF THE UNITED STATES, Defendant.	Civil Action No. 688-67

TRANSCRIPT OF PROCEEDINGS

Tuesday, January 6, 1970

(MOTIONS)

Copy for:

plaintiff's Counsel

Pgs. 1-12

NICHOLAS SOKAL
Official Court Reporter
United States Courthouse Washington, D.C.
Telephone: ST 3-5700
Ext. 454

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HELENA HILDA BUTTERFIELD, Plaintiff vs THE ATTORNEY GENERAL OF THE UNITED STATES, Defendant	Civil Action No. 688-67

Tuesday, January 6, 1970

The above-entitled cause came on for hearing on motion To Dismiss or For Summary Judgment (Defendant); and To Deny Dismissal or For Summary Judgment (Plaintiff), before THE HONORABLE JOHN J. SIRICA, at approximately 10:00 a.m.

APPEARANCES:

HELENA HILDA BUTTERFIELD, appeared in Proper Person.

PAUL SUMMITT, ESQ., on behalf of the United States.

P R O C E E D I N G S

THE COURT: All right, sir.

MR. SUMMITT: If it please the Court, the defendants here in this case have moved for Summary Judgment. The sole issue in this case, and I will be very brief, arises out of application by the plaintiff for a preference under the immigration quota system called as a preference as a professional or someone skilled in the art which would contribute to the United States. And after a substantial immigration record and deportation proceeding in 1965 Congress passed an act which liberalized and changed quotas and she applied for preference under this system.

The way this is done is essentially the plaintiff or whoever applies has the burden of coming in and showing she is entitled to the preference and then the Immigration Service under the statute has the opportunity to investigate and to compile its own record and then based on the administrative record the district director makes a decision as to whether she is entitled the preference, and then there is the right to appeal to the regional commissioner, and from there she has the right to --

THE COURT: From reading the file I understand the Government contends that the Immigration and Naturalization Service found that because of outstanding debts in exess of $30,000. including several unsatisfied court judgments the plaintiff was

incapable of carrying out her asserted purpose of establishing the cultural centers. That is correct, isn't it, that is your position?

MR. SUMMITT: That is correct, sir.

THE COURT: I'll hear from the plaintiff.

MRS. BUTTERFIELD: May it please Your Honor: this charge of financial inability to establish my school and cultural center, I have maintained from the outset that when I was on the threshold of receiving a school permit for which I had applied assiduously for six months to the Department of Licenses and Inspections here in the District of Columbia, I was fraudulently disrupted from obtaining my permit by the man from whom I was purchasing that property.

Now, the year before I applied for t he permit to open a school in that particular place, 1726 New Hampshire Avenue Northwest, I had applied to the BZA --Board of Zoning Adjustment-- for a permit to open a school on the property on Massachusetts Avenue near Sheridan Circle. The real estate agent handling that property advised me that I was sure to receive a permit to open the school because there had been a school there previously for about 18 or 20 years, and usually the Board allows continuity of occupancy. But the Board turned me down on that application because the previous school had been for children. I was applying for a permit to operate a cultural center mainly for young adults and the major requisite for a

property for a school for young adults was parking. There was no parking on the premises nor within 800 feet, and I completely forgot about that property because there was no alternative business use. I myself couldn't live in that large property, afford t he rent, or do anything with it so I just forgot it.

When I was shown this property at New Hampshire Avenue the owner gave me to understand that it was a fully licensed boarding-guesthouse and the more I thought about that property --it was a magnificent place, 33 rooms; I have here photographs of it if you'd like to see it, and 12 bathrooms, three stories, and a magnificent basement. It reminded me very much of the villa I had in Rome, Italy, which was even far bigger, but nevertheless, the more I thought about this property, I assumed that if for any reason it was also in a residential area, the Board of Zoning Adjustment would deny me an application for parking I could always use that property as a residential house for international guests.

Apart from him telling me it was fully licensed I might never have entered into a purchase contract anymore than I did the previous property the year before.

Then after six months I took the property over. I continued operating it as a boarding house, guest house --international guesthouse, nearly 300 federal government, AID participants came from forty different countries all over the world, everyone a graduate student. I was laying, you might say, the

foundation for a most wonderful international culture center to offer courses in language, music, arts, and I myself, besides being an honor graduate from a British university in English and in History, I have studied with the musical director of the Opera House in Rome; I am a concert artist, and I have sponsored in this country alone over sixty young, professional artists of the highest caliber.

THE COURT: Excuse me, let me ask you a question.

Do you deny the Immigration and Naturalization Service found you had outstanding debts in excess of $30,000.00, including several unsatisfied court judgments? Do you deny that?

MRS. BUTTERFIELD: Yes, Your Honor, because this is what happened: when I was on the threshold of getting that school permit when the owner had an offer to sell the property for $250,000 cash he stalled my receiving my permit and if the deficiencies of that building which he was supposed to correct and he was suing the former owner for $110,000 for fraudulent concealment of deficiencies, he turned around and did the same thing to me. Later, when the Department of Inspections and Licenses sent me up a list of deficiencies, they were identical with that list. Had he corrected them he wouldn't have stopped me from opening my school. And as a result of stopping me from opening my school, naturally he was able to get the building back. And I did have a certain number of debts which I attribute to that false misreprentation of property.

Now, Your Honor, when I appealed the district director's decision to the regional commissioner I asked him the same question I am asking you respectfully now: is it right that I should have been denied my third preference in this country through the fraudulent misrepresentation of a former alien from Lebanon who became naturalized citizen, who subsequently to becoming a citizen filed personal bankruptcy for $30,000 in Alexandria court? Only yesterday I confirmed it again from the court, he filed, and I asked that question, and whether I was speaking a little fast, I was allowed only 20 minutes, I was going all the way to Richmond, whether the stenographer took it down incorrectly or what I don't know, but the record came back I said my debts were $30,000, which is incorrect and very prejudicial to me.

Your Honor, not only that, that report from the regional commissioner was largely based on a report that went up to him from the district director based on an interview of December 27, 1966. I received notice that I had to go up to discuss my professional qualifications. I had already submitted evidence and my teaching qualifications,of the establishment of my schools in London and Rome, Italy, and so on. I went up very happy to discuss professional qualifications, and suddenly without a word of warning, I was plunged under oath to give a financial statement of my work almost ranging back 15 years. That was very, very --I mean I was not prepared, and they started finding reasons for past financial situations to be a reason to

deny me my third preference, and they never made any detailed inquiries about what happened at 1726. Why just what happened 15 years ago a nd not discuss what happened in the relevant situation six months previous to this very situation?

That has been my contention, Your Honor. There has been no really extensive investigation by Immigration as they claim. I believe they were very prejudiced against me by what I regard a perjured affidavid by this man in the record. On 3d of December 1966 he claimed I said I had all kinds of financial backers to help me buy that property when in reality I told him I was depending on the proceeds of my school and he said that just to cover up that he never disclosed the deficiencies to me about the building.

The whole thing I feel, Your Honor, has been gravely prejudicial against me and what made it more prejudicial against me, Immigration have come in with two very serious allegations. They say I have been here i n defiance of the law. That is totally incorrect. Before I left Italy I talked with the Consul General of the American Embassy and I said I am going on a visitor's visa, is there a possibility of me adjusting my status and he s aid yes, there was. The question of my nationality never arose because I had come to the United States in 1959 and there had been an announcement in the Italian press that all holders of U.S. visas could get them renewed without providing birth

certificates and the question of birth never came up. I was under the impression that a dmittance to the United States was under nationality and when I arrived, to my astonishment I found I had t o come in under the Indian quota because I was born there, as my parents. My father was a government official in the British government before we left. And the restrictions governing people under the Indian quota of 100 compared with 65,000 under the British quota was very, very diverse. Under the British quota I could have found any kind of position with anybody as long as I found employment, and three to four weeks got permanent residence. Under the Indian quota I had to find a job where there was a shortage of labor, where I had previous experience, which was urgently required be filled, which no American citizen could fill, and if I was lucky to find it I had to stay in that job until my quota came up in two and a half years.

Your Honor, I went to the government schools to teach. They turned me down because I was not a United States citizen, that U.S. citizens can only teach in federal government schools. I went to a junior college, the Oakland School of Arts and Crafts, they wanted an English teacher. The principal liked my application because of my past experience and extracurricular activities to teach English. And I said could he sign the application under the Indian quota no American could fill the job; no, he said, there are six people here could fill the job. And the job was filled by a graduate student from Berkeley. By that

time I had an operation for appendicitis after arriving in January 8, 1962. In early May the semester was coming to a close, I couldn't find anybody to say I could teach English and History and do a job that no American could fill.

So you see, Your Honor, I wasn't deliberately defying any law. I heard about the private bills. The Congressman introduced a private bill, and according to the rule in Congress, any bill that is outstanding at the end of the second session is introduced again in the following session. Although the Congressman introduced two bills at that time it was really one and the same bill. And I tried, and when the bill was turned down I tried o nce again, Your Honor, to come in under the Indian quota. I went two and a half hours journey to Los Angeles to see the principal of a school. She said: I c alled all kinds of private schools just this morning, one of my teachers slipped and broke her hip, I need somebody urgently. I said can you sign this application? Oh, no, she said, I have been a principal for 20 years and I have never been more than 48 hours without a teacher. Many married women like to come back to teach and they prefer smaller classes. And she said she cannot sign that.

I went to the Southern University of California to the department of teaching foreign students English, and he said: I like your application very much. If you had only come in September I could have given you something but now in February, the second semester, it will depend what students come. Once

again I needed something at once. And also, I am quite sure he would have found many Americans to fill the job.

In desperation I thought there is nothing else; I was prepared to go to Canada. The District Director insisted I should provide an air ticket. The alternative to providing an air ticket was deportation to England. The March '63 deportation hearing after the private bill had been introduced the special inquiry officer granted me --

THE COURT: Excuse me. I will give you five more minutes.

MRS. BUTTERFIELD: All right, Your Honor. Granted me permission to take voluntary departure at no expense to the government. When I was prepared to leave at no expense to the government and the District Director insisted I should go by air and this notice came suddenly and I had only a few weeks to go to a brand new country, it wasn't in defiance of the law, Your Honor, I didn't leave, or violation, I felt he was violating my Constitutional right to leave the country I chose at no expense to the government and decided to come straight to Washington. And within an hour of arrival I went right to the Commissioner's office. They knew about the deportation, if they didn't deport me that is not in defiance of the law.

Subsequent to that the second private bill was introduced and then came a change to the law and I filled under this

third preference, Section 245. The Immigration accepted my petition and did not deport me while they were adjudicating my petition. And when they denied it the Court, under Section 10, U.S. 5, paragraph 1009, the Supreme Court deemed it appropriate for an alien to make --to seek discretionary relief.

Your Honor, I have come here --I believe Congress granted this alien's right to receive justice in the courts. I am not in defiance of the law. And Your Honor, they said extended litigation. When I f iled this action three years ago it was Immigration who advised me to file in the Court of Appeals. That went on for two years. When the court decided it did not have jurisdiction I filed a motion urging the court please settle my case because I am so weary of this litigation. Now March will make three years and I am back where I started three years ago, urging you, please, Your Honor, this is not worthy of summary judgment.

I feel there is grave wrong for much more extensive investigation. Immigration never asked for a copy of my contract, never asked what I did for six months to engage in my professional activities; they never saw this man. I got it all here. This is why I asked for a continuance. While he was suing this other lady for $110,000, they never saw that. I was fraudulently bilked. And Your Honor, I am a member of the profession as I pointed out under their own motion. A member of the profession

does include teachers of elementary, secondary schools and colleges and academies.

Your Honor, I believe I am a professional person entitled under the law to third preference because I am a teacher with wide experience and t hat I should not be denied because I was fraudulently bilked.

I am asking Your Honor for further investigation by this court or an opportunity in open trial if necessary to produce all the evidence I have here that I have been trying to tell you about.

I ask this summary judgment b e denied because it is very discriminatory.

THE COURT: The Court does not believe that the Immigration and Naturalization Service abused its discretion in this case. Motion for Summary Judgment is granted. You have a right to appeal from this judgment if you wish to do so.

All right, we will take a ten minute recess.

* * *

CERTIFICATE

It is certified the foregoing is the official transcript of the proceedings indicated.

Nicholas Sokal
NICHOLAS SOKAL
Official Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HELENA HILDA BUTTERFIELD,

Plaintiff,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

Civil Action No. 688-67

FILED

JAN 22 1970

ROBERT M. STEARNS, Clerk

JUDGMENT

This cause having come before the Court on defendant's motion for summary judgment, and plaintiff's opposition thereto; upon consideration of the argument of counsel, the record and the memoranda of the parties; and the Court being fully advised in the premises;

It is by the Court this 22nd day of January 1970, ORDERED AND ADJUDGED:

(1) That defendant's motion for summary judgment be, and hereby is, granted; and

(2) That the action be, and hereby is, dismissed.

John Lewis Sirica
UNITED STATES DISTRICT JUDGE

FILED

FEB 13 1970

ROBERT M. STEARNS, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HELENA H. BUTTERFIELD,]
]
Plaintiff,]
]
v.] Civil Action No. 688-67
]
IMMIGRATION AND NATURALIZATION]
SERVICE OF THE UNITED STATES,]
]
Defendant.]

ORDER

Upon consideration of plaintiff's motions to reconsider and vacate order to dismiss by summary judgment of January 22, 1970, to order the Immigration and Naturalization Service to file the complete administrative record, and to set an early open trial, it is this 13th day of February, 1970

ORDERED that the motions be, and the same hereby are, denied.

John J. Sirica
United States District Judge

United States District Court for the District of Columbia

#1 — — /

FILED
FEB 20 1970
ROBERT M. STEARNS, Clerk

Helen H. Butterfield, Plaintiff.
vs.
Immigration & Naturalization Service U.S. Defendant.

CIVIL No. 688-69

NOTICE OF APPEAL

Notice is hereby given this 20th day of February, 1970 that Plaintiff Helen H. Butterfield hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22 day of ~~February~~ January, 1970, in favor of Defendant against said Plaintiff.

Helen H. Butterfield
Attorney for
Plaintiff Pro Se.

Certificate of Service

Copies mailed to U.S. Atty U.S. Court House - 2nd & Constitution Ave. D.C.
Paul Summit - U.S. Atty 13
Dept. of Justice - Washington, D.C.

February 20th 1970.

Helen H. Butterfield
Plaintiff Pro Se.

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23993

HELENA HILDA BUTTERFIELD,

Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Appellee.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

William H. Dempsey, Jr.
Anthony A. Lapham
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Appellant

Of Counsel:

Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

BRIEF FOR APPELLANT

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IN THE
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No. 23993

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Appellee.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF ISSUES

This is an appeal from a judgment of the United States District Court for the District of Columbia upholding the administrative denial of appellant's application for third-preference visa classification under Section 203(a)(3) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1153 (a)(3). The application for preference classification was based on appellant's status as a member of the teaching profession. The administrative denial of the application by the Immigration and Naturalization Service (hereinafter "INS") was based, not upon a finding that appellant's qualifications as a teacher were inadequate -- INS has

throughout conceded that they are adequate -- but rather upon a factual finding that appellant did not have the financial ability to practice her profession in the immediate future. That finding was made after a "hearing" in which, though she was put under oath, appellant was not represented by counsel and as to which she had no specific notice of the subjects to be covered. The questions presented are:

(1) Where the controlling statute, 8 U.S.C. § 1153 (a) (3), directs that third visa preference "shall" be given to "members of the professions," and where appellant's professional qualifications were conceded by INS, should appellant's application for third visa preference have been denied by that agency on the ground that for financial reasons she was not immediately able to practice her established profession?

(2) Even if the statute permits denial of a visa preference application on the ground of temporary financial distress, was the INS finding of such distress made upon the basis of proceedings that deprived appellant of procedural rights guaranteed by the Fifth Amendment to the United States Constitution?

PRIOR PROCEEDINGS IN THIS COURT

The final administrative decision that appellant was not entitled to visa preference was made by a Regional Commissioner of INS on March 3, 1967. Appellant sought to challenge that decision both in the District Court, where a petition for review was filed pro se on March 22, 1967, and in this Court, where a similar petition was filed pro se on March 27, 1967. On June 19, 1967, the petition filed in the District Court was ordered held in abeyance pending

disposition of an INS motion to consolidate both review proceedings in this Court. On February 20, 1969, the petition that had been filed in this Court was dismissed for want of jurisdiction. Butterfield v. I.N.S., ___ U.S. App. D.C. ___, 409 F.2d 170 (1969). The dismissal, which made unnecessary any decision on the INS motion to consolidate, was put upon the ground that under Kwok v. I.N.S., 392 U.S. 206 (1968), exclusive original jurisdiction of appellant's petition for review was in the District Court. Thereafter the proceedings leading to this appeal were had in the District Court on the petition for review originally filed there in 1967.

REFERENCE TO RULINGS

The District Judge did not file a written opinion or any written findings of fact or conclusions of law. The Judge's oral opinion, rendered at the close of the arguments on appellee's motion for summary judgment, consists of the following: "The Court does not believe that the Immigration and Naturalization Service abused its discretion in this case. Motion for Summary Judgment is granted." Transcript of Proceedings, January 6, 1970, page 12 (J.A. 47).[1/]

STATEMENT OF THE CASE

Our contentions are that appellant's application for visa preference was denied by INS on the basis of an impermissible construction of the Immigration and Nationality Act (hereafter "the Act"), but that even if a correct statutory standard was applied the INS proceedings were never-

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1/ The pages in the joint appendix (cited herein as "J.A.") are consecutively numbered.

theless conducted in a manner that denied appellant due process of law. The facts relating to these contentions, many of which were summarized in this Court's opinion in Butterfield v. I.N.S., supra, are now set forth.

Initial entry and order of deportation

Appellant was born in India in 1917. Her parents were both British and her own nationality has always been British. She entered the United States on January 8, 1962, on a nonimmigrant visitor's visa that authorized her to stay until July 7, 1962. She overstayed the visa, and her largely uncounseled efforts[2/] to obtain status as a permanent resident alien in this country have continued ever since.[3/]

After proceedings under Section 242(b) of the Act, 8 U.S.C. § 1252 (b), a special inquiry officer issued an order of deportation on March 22, 1963. No appeal was taken to the Board of Immigration Appeals, and the order of deportation accordingly became final. Attempts by appellant to obtain relief by way of private legislation in the Congress did not succeed, but while they were pending INS did not seek to deport appellant.

2/ Appellant was assisted by counsel in the preparation of the petitions for review filed in 1967 in the District Court and in this Court. See Butterfield v. I.N.S., supra, ___ U.S. App. D.C. at ____ n. 6; 409 F.2d at 171 n. 6. But these petitions were filed pro se, and so far as the record shows appellant has not been represented by counsel at any other stage of the agency or judicial proceedings. After the District Court's decision, present counsel undertook to represent appellant because she was unable to retain other counsel and because she faced deportation even though she had, in the main, been forced to represent herself both before the INS and before the courts.

3/ Appellant's difficulty in obtaining status of this kind is attributable in part to the fact that, even though she was born of British parents and has always had British nationality, she was chargeable to the small and over-subscribed Indian quota rather than to the large and undersubscribed British quota. The national origins quota system was, as we indicate below, still in force in 1962.

Application for third preference classification

On January 17, 1966, shortly after the major 1965 revision of the Act that replaced with a worldwide quota system the old national origins quota system for selecting immigrants to the United States and that also established new categories of persons entitled to visa preference,[4/] appellant filed her pro se application with INS for classification as a third preference immigrant.[5/] As we discuss more fully below, Section 203(a)(3) of the Act, 8 U.S.C. § 1153 (a) (3), makes third preference classifications available to "members of the professions," and Section 101 (a) (32) of the Act, 8 U.S.C. § 1101 (a) (32), defines "profession" to include "teachers in the elementary or secondary schools, colleges, academies, or seminaries."

4/ See generally I Gordon & Rosenfield, Immigration Law and Procedure §§ 2.25-2.27, pp. 2-112 to 2-120.

5/ Had this application for third preference been granted rather than denied, the order of deportation outstanding against appellant would not have been lifted or necessarily affected in any other way. However, approval of the application would have put appellant in a position to apply for adjustment of status under Section 245(a) of the Act, 8 U.S.C. § 1255 (a), which provides that:

> "The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

Relief under this section is available to an applicant, other than an alien crewman, even though deportation proceedings may be pending against him. I Gordon & Rosenfield, op. cit. supra note 4, § 7-7b, p. 7-57. The section's requirement that "an immigrant visa is immediately available to him at the time his application is approved" generally presents no problem when the applicant is entitled to preferred visa status, see I Gordon & Rosenfield, op. cit. supra note 4, § 7-7b, p. 7-62, and it was for the purpose of meeting this requirement that appellant sought third preference.

The application for third preference was made on the standard INS form.[6] Appellant listed her occupation on the form as "President : Director - Educational and Cultural Organization," and in response to the question whether she intended to engage in her occupation in the United States appellant checked the box marked "Yes" and added this explanatory statement: "I intend to operate international cultural centre - promoting courses in language, history, literature, musical activities, concerts." Submitted along with the application was a separate Form ES-575A [7], a statement of professional qualifications used by INS in connection with a statutory certification procedure whereby the Secretary of Labor is asked by INS to determine whether a labor shortage exists in the applicant's occupation and whether the wages and working conditions of persons already employed in that occupation would be adversely affected by applicant's employment.[8] On the Form ES-575A appellant identified her profession as teaching and set forth a detailed account of her qualifications and present and past teaching experience. To further support her application, appellant submitted to INS a transcript of her academic record at the University of

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6/ A copy of the application (J.A. 1-2) was attached as Appendix C to the Motion to Dismiss Or In The Alternative For Summary Judgment filed by appellee in the District Court.

7/ A copy of the completed form (J.A. 3-4) was attached as Appendix D to the Motion to Dismiss Or In The Alternative For Summary Judgment filed by appellee in the District Court.

8/ The certification procedure is discussed more fully at pages 18-20 , infra.

Wales, where she received a B.A. degree in 1951.[9/]

The INS has repeatedly conceded that the application for third preference classification and supporting materials submitted by appellant established her qualifications as a member of the teaching profession.[10/] This case does not, then, involve any dispute about appellant's credentials as a member of the professions within the meaning of Section 203(a)(3) of the Act. Neither does it involve any issue about whether appellant could obtain employment clearance from the Department of Labor, because the Form ES-575A was in fact returned to INS bearing the Department's endorsed certification that appellant was eligible for a third preference.[11/]

On December 27, 1966, pursuant to a written INS notice of an appointment concerning her "pending petition to classify preference status on basis of profession or occupation,"[12/] appellant appeared without counsel in the office of Lewis Barton, an INS District Director. Appellant understood that she was to be interviewed on this occasion about her professional

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9/ In a letter dated November 18, 1966, the Office of Education, Department of Health, Education, and Welfare, advised INS that the foreign degree awarded to appellant in 1951 was "comparable to a 4-year bachelor's degree in the U.S." (J.A. 5-6)

10/ So, for example, appellee stated on page 4 of its Opposition to Motion for Stay Pending Appeal: "The record shows that the administrative authorities were well aware that appellant has professional status as a teacher and that her application was based on prospective teaching activities. The administrative denial of her petition was based purely and simply upon the determination that, conceding her status as a teacher and conceding her purpose and intent to teach in a cultural school which she would herself establish, manage, and control, she lacked the financial means and the ability to pursue her profession in this way in the immediate and foreseeable future."

11/ The Department's certification is endorsed on the bottom of the Form ES-575A to which reference is made in note 7, supra.

12/ A copy of the undated notice appears at J.A. 7.

qualifications.[13] What in fact happened is that she was interrogated under oath and at length about various business activities and transactions dating back over a period of many years. The factual findings relating to appellant's alleged financial irresponsibility, upon which INS has consistently relied as warrant for its denial of appellant's preference application, were based on evidence assertedly adduced during this interrogation. Whether these findings have any substantial support cannot now be determined since the transcript of the interrogation, we are informed by counsel for appellee, has been lost by INS and therefore is not part of the record on appeal. However, a strong sense of the tenor and subject matter of the interrogation emerges from the following excerpt taken from a memorandum to the file prepared by an immigrant inspector, one of the three INS officials who were present:

13/ See, e.g., appellant's pro se argument in the District Court:

"Your Honor, not only that, that report from the regional commissioner was largely based on a report that went up to him from the district director based on an interview of December 27, 1966. I received notice that I had to go up to discuss my professional qualifications. I had already submitted evidence and my teaching qualifications, of the establishment of my schools in London and Rome, Italy, and so on. I went up very happy to discuss professional qualifications, and suddenly without a word of warning, I was plunged under oath to give a financial statement of my work almost ranging back 15 years. That was very, very -- I mean I was not prepared, and they started finding reasons for past financial situations to be a reason to deny me my third preference, and they never made any detailed inquiries about what happened at 1726 [the location of her District of Columbia establishment]. Why just what happened 15 years ago and not discuss what happened in the relevant situation six months previous to this very situation?" (Transcript of Proceedings, January 6, 1970, pages 6-7) (J.A. 41-42.)

See also appellant's letter to the Deputy Attorney General, dated March 19, 1967, in which she contrasted her expectations about the hearing with the actual events:

"Despite the definite understanding that was given me at the last time I was required to go to the Immigration Office, that the next time I would be asked to attend, would still be in connection with further documentary evidence about my teaching experience, nevertheless on this next occasion I went up, not a word was said about that matter, instead I was put through a grueling two-hour cross-examination about my financial details covering practically the last 15 years." (J.A. 16)

> "Subject was sworn in and agreed to present testimony concerning her occupation and financial history under oath. She was questioned at length regarding the operation, financial and otherwise, of her schools in London and Rome and also in regard to the cultural foundation she has operated in the United States. She was also asked about a series of unpaid debts totalling close to $10,000 presently owed by her to many concerns in this country. Subject was evasive, verbose, and vague in regards to most of the questions asked of her. She denied that she was a poor financial manager as is evident from a review of the information contained in the file about her financial operations . . . . The interview evidenced . . . that she was unable to recollect for the financial transactions involved in rooming [sic] the schools . . . ." 14/

Denial of the Application by INS

The District Director denied the third preference application in a decision that is set forth in full in the margin. 15/ Appellant thereupon

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14/ A copy of this memorandum (J.A. 8-9) signed by G.E. Guyant, Immigrant Inspector, appeared as Exhibit 1 attached to appellant's Motion For the Court(1) To Reconsider and Vacate Order to Dismiss By Summary Judgment Of February 22, 1970, (2) to Order (a) INS to file the complete Administrative Record (b) to set an early open trial. This motion was filed pro se in the District Court on February 2, 1970.

15/ "You have based your claim to Third Preference classification under Section 203(a)(3) of the Immigration and Naturalization Act on your qualifications as a teacher and your experience in opening and directing schools and cultural centers. You have stated that it is your intention to teach only in a school established and operated by you. You state that it is your intention also to establish and operate a cultural center.

"The record in your case shows that while pursuing your profession in the United States since 1962 you have accrued a series of debts in California and in Washington, D.C. which are still outstanding. Local credit bureau records show that you owe a total of $3,851.16 to eight firms in the District of Columbia.

"Three creditors have obtained judgments against you but the debts are still unpaid. The record shows that you failed to pay a $3,000.00 prize

[Cont'd on page 10]

appealed to the appropriate INS Regional Commissioner.[16] She appeared before the Regional Commissioner to present her case, and also filed a brief pro se. The decision dismissing the appeal rested exclusively upon a finding respecting appellant's financial condition.[17] The relevant parts of that decision -- the final action by INS -- are as follows:

15/ [Cont'd from page 9]

> to the winner of a vocal contest you promoted in San Francisco in 1963. The record also shows that you have attempted to establish a school and cultural center in the United States and have failed to do so.
>
> "The phrase 'for the purpose of performing', in Section 212(a)(14), clearly indicates that an immigrant alien within the contemplation of Section 212(a)(14) must establish a bona fide intent to engage immediately or in the foreseeable future in his profession or a related field (Matter of Semertian, Interim Decision 1627).
>
> "On December 27, 1966 at an interview at this office, you were appraised of the record of your failure to pay your debts and your failure to establish a school or cultural center in the United States. You were given the opportunity to show that you have the financial means to establish a school or a cultural center in the immediate or foreseeable future. You failed to do so." (Appendix B to Appellee's Motion to Dismiss or in the Alternative for Summary Judgment in the District Court)(J.A. 11).

16/ As authorized by 8 C.F.R. § 103.1(e)(1).

17/ The District Director's decision (supra note 15) referred also to an alleged statement by appellant that "it is your intention to teach only in a school established and operated by you." What evidentiary basis there might have been for this statement by the District Director cannot be determined from the record, since INS has lost the transcript of the hearing (see supra p. 8). In any case, the decision of the Regional Commissioner did not rest upon any such ground.

" In oral argument on February 15, 1967, petitioner stated (a) that she has operated schools in London, England and Rome, Italy. (b) She further stated that these schools were closed because of unforseen accidents or poor financial situations. (c) She also stated that in the United States she has used the trade name The Regent Foundation. (d) The petitioner further stated that her current indebtedness is somewhat less than $30,000, and she is without capital with which to resolve her financial obligations.

The record discloses that the petitioner has since 1962 accrued a series of debts in California and Washington, D.C. which are still outstanding. Three creditors have obtained judgments against the petitioner which have not been settled. In 1963 the petitioner failed to pay a $3,000.00 prize to the winner of a vocal contest promoted by the petitioner in San Francisco, California. (f) The record further discloses that the petitioner has been unable to establish cultural centers in the United States. All efforts to do so have resulted in increased indebtedness.

Section 203(a)(3) of the Act provides that visas shall be made available "to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States."

The petitioner seeks third preference classification as a member of the professions and to be eligible for such classification under section 203(a)(3) an alien immigrant must qualify for such classification. On the basis of the record, the petitioner has failed to establish that she is financially capable of establishing and operating international cultural centers in the United States as set forth in her petition.

After carefully considering all the evidence of record, together with petitioner's representations on appeal, we find the decision of the District Director to be correct and proper. The appeal will be dismissed." (Appendix A to Appellee's Motion to Dismiss or in the Alternative for Summary Judgment in the District Court) (J.A. 12-13).

We are advised by counsel for appellee that the proceedings before the Regional Commissioner were not transcribed.

ARGUMENT

Our central contention is that an alien seeking an immigrant visa is entitled to a third preference classification under Section 203(a)(3) of the Act if he satisfies a single requirement -- qualification as a member of the professions.[18] Once appellant was found to meet this requirement -- as INS has repeatedly conceded that she does -- the proper statutory inquiry was at an end. The preference application should then have been granted. Instead, however, INS manufactured a second requirement -- present financial capacity to practice one's profession -- and used it to deny appellant's application. For reasons we will show later, the INS decision cannot be sustained even if the agency was justified in considering matters other than professional status. But we will show first that the second requirement imposed by INS is utterly inconsistent with the language and history of the third preference provision of the Act and that it has never received -- and should not now receive -- judicial sanction.

I.

Under the Act the applicant's professional status is the only condition for third preference classification

Essentially what is involved here is an issue of statutory construction. We begin by taking note of certain broad policy considerations in order to frame the statutory context in which the issue arises.

18/ We leave aside here the fact that certification of the applicant may also be required. Such certification, which in any event is not an INS function and which has to do with the labor situation in the United States rather than the credentials of the applicant, is discussed separately at pages 18-20, supra.

The general statutory scheme

The immigration laws express important and deliberate national policies. One of these is that the flow of aliens into this country should be subject to some numerical limitation, and to this end the Act, as amended in 1965,[19] establishes an annual ceiling of 170,000 on the number of aliens who may be lawfully admitted to the United States for permanent residence.[20] Obviously a policy of numerical limitation means that not all applicants for admission can be accommodated and that there must be some criteria for determining who gets an immigrant visa and who does not. A second general policy of the Act, as amended in 1965, is that an applicant's race and place of origin should not play a role in the selection process.[21] But the Act discriminates in other ways. It recognizes certain values -- family unity is rated most highly -- and favors the admission of aliens who can contribute to those values. The instrument of this third policy of the Act is the preference system under which seven

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19/ By P.L. 89-236.

20/ Section 201(a) of the Act, 8 U.S.C. §1151(a). The 170,000 annual ceiling is exclusive of "special immigrants" and "immediate relatives," as elsewhere defined in the Act, who may be admitted to the United States without numerical limit.

21/ The 1965 amendments to the Act did away with the national origins quota system under which fixed annual immigration quotas were assigned to particular nationalities. One of the objectives of this system was to preserve the racial balance of the United States. The statutory method used to achieve this objective was to allot quotas to national groups according to the ratio of those groups and their descendants to the total population of the United States in 1920. In the actual operation of the system two-thirds of the quota numbers were reserved for countries -- Britain, Germany, and Ireland -- with modest immigration demands. The new system inaugurated in 1965 establishes a worldwide quota and, subject to the preferences and certain other limitations, allots numbers on a first-come first-served basis without regard to race or national origin. See generally I Gordon & Rosenfield, op. cit. supra note 4, §§ 2.5, 2.25, at pp. 2-29 to 2-30 and 2-112 to 2-116.

classes of persons are given priority in the selection process -- over each other according to their ranking and collectively over the class of immigrants who are not entitled to any preference.[22] Still a fourth policy with which the Act is concerned is the protection of the American working man against loss of employment or downward pressure on wages by reason of an influx of aliens into the domestic labor market.

The third preference

Appellant applied to INS for classification as a person entitled to a third preference in the issuance of immigrant visas. The class of persons who are eligible for this preference is defined in Section 203(a)(3) of the Act, 8 U.S.C. § 1153 (a)(3), as follows:

> "Visas shall next be made available . . . , to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States."

The class of persons who are entitled to third preference under this language is made up of two subclasses. "Members of the professions" constitute one distinct subclass and persons who will "substantially benefit prospectively the . . . United States" because of their exceptional ability constitute the other.[23] Appellant sought third preference as a member of the professions and INS -- correctly -- did not construe her application as presenting any claim to preference based on exceptional ability that would prospectively benefit

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22/ The seven preference classifications are all set forth in Section 203(a) of the Act as amended, 8 U.S.C. § 1153(a). Prior to the 1965 amendments there were only four preference classifications. 66 Stat. 178.

23/ See Tang v. I.N.S., 298 F. Supp. 413, 415 (C.D. Cal. 1969) for recognition, if any is needed, that Section 203(a)(3) of the Act creates two discrete categories of immigrants entitled to third preference.

the United States.[24]

The term "profession" is defined by Section 101(a)(32) of the Act, as amended, 8 U.S.C. § 1101 (a)(32) to.

> ". . . include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Appellant's application and supporting documents identified teaching as the professional category in which she sought preference.

As we have already noted, and as the opinions of both the District Director and the Regional Commissioner as well as the papers filed by appellee in the District Court make absolutely clear,[25] INS determined that appellant was qualified as a member of the teaching profession. In our view that determination should have ended the matter. Not even arguably is there anything in the wording of Section 203(a)(3) that would permit INS to deny an application for third preference once the applicant's professional qualifications have been established. The statutory command is that visa preference "shall . . . be made available" to "members of the professions."[26] It is

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24/ ". . . the Immigration Service did not rule on her petition for the benefits of Section 203(a)(3) of the Act, with reference to whether she possesses exceptional ability in the sciences or the arts and would substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." Appellee's Opposition To Motion For Stay Pending Appeal, page 4.

25/ See note 10, supra, and text of INS opinions quoted on pages 9-11, supra.

26/ Appellee discussed at length in its Opposition To Motion For Stay Pending Appeal the narrow scope of judicial review that is appropriate when discretionary INS rulings are challenged. We doubt that we should be held, as appellee argues, to a showing of "abuse of discretion" in seeking review of an INS determination made under a statute mandating that visa preference "shall . . . be made available." But we do not pause over this issue since, however narrow the scope of judicial review may be even under an "abuse of discretion" standard, it is at least broad enough to encompass the claims we are making on this appeal -- that INS applied incorrect principles of law and that its proceedings lacked essential fairness.

[Cont'd on page 16]

not, as appellee would have it, that visa preference shall be made available only to those members of the professions who can demonstrate to INS their "financial means and the ability to pursue [their] profession . . . in the immediate and foreseeable future." 27/

Appellee's wishful reading -- or rather misreading -- of Section 203(a)(3) finds no more support in the case law than it does in the statutory language. We have not uncovered a single judicial decision -- and appellee has never cited one -- holding that there is any requirement apart from professional status for third preference classification as a member of the professions. The only decision that so much as hints at the existence of some second requirement is Factora v. I.N.S., 292 F. Supp. 518 (C.D. Cal. 1968), in which the Court overturned an INS ruling that an applicant for third

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26/ [Continued from page 15]

Muskardin v. I.N.S., 415 F.2d 865, 867 (2d Cir. 1969); Loza-Bedova v. I.N.S., 410 F.2d 343, 346 (9th Cir. 1969); Kasravi v. I.N.S., 400 F.2d 677, 675 (9th Cir. 1968); Tang v. I.N.S., 298 F. Supp. 413, 417 (C.D. Cal. 1969); Lechich v. Rinaldi, 246 F. Supp. 675, 684 (D. N.J. 1965).

27/ Appellee's Opposition To Motion For Stay Pending Appeal, page 4. There have been several other INS formulations of this requirement, but they all come to the same thing. The applicant "must establish a bona fide intent to engage immediately or in the foreseeable future in his profession or a related field" (Opinion of District Director, supra note 14). The applicant must establish that she is "financially capable" of practicing her profession" (Opinion of Regional Commissioner, supra p. 11). Applicants must demonstrate that their "bona fide intent and capability of practicing their qualifying profession in the United States" (Defendant's Memorandum Of Points And Authorities In Support Of Motion To Dismiss Or In The Alternative For Summary Judgment, page 4).

preference was unqualified as a professional in the field of business administration. Without passing on its validity, the Court described as "cogent" the INS argument in this case that a third preference based on membership in a profession could be conditioned on intent to practice that profession. But even if that argument were "cogent," it has nothing to do with this case. As we have pointed out (supra n.17), while the District Director's decision contained a statement relating to appellant's "intention," the Regional Commissioner's did not, but rather rested entirely on appellant's alleged financial disabilities. Appellee surely must defend its action on the basis of the position taken by the highest administrative officer passing on the case. Moreover, as we show later, if intent to practice one's profession were the only hurdle placed in appellant's way, her application should have been granted since her intention to teach should have been clear to INS even if her ability to do so in her own school was not.

In any event, the Factora court's impression respecting the "cogency" of the INS argument there advanced was not well considered. The merit of the argument, in the Court's view, stemmed from the fact that INS had apparently imposed the intent requirement in earlier administrative actions. 292 F. Supp. at 521-522. But obviously a course of agency action cannot sanctify a practice that the relevant statute precludes, and the Court did not explain how the intent requirement could be reconciled with the plain language of Section 203(a)(3). It didn't even try. It held instead that an applicant's current employment in a non-professional capacity (as an accounting clerk) would not support an inference that he didn't intend to practice his profession (business administration), so the case stands at least for the proposition that temporary employment outside the qualifying profession is not disabling.

Other third preference cases focus only on INS determinations that applicants did not qualify as members of any profession. Yau v. I.N.S., 293 F. Supp. 717 (C.D. Cal. 1968); Lechich v. Rinaldi, 246 F. Supp. 678 (D. N.J. 1965) (decided under the former first preference provision, the forerunner of the third preference provision in the Act as amended in 1965). And see Dong Yup Lee v. I.N.S., 407 F.2d 1110 (9th Cir. 1969) (involving review of an INS determination that applicant not entitled to third preference as person of "exceptional ability"). There is no suggestion in these cases that third preference could be denied on any ground other than professional status, even though in one instance the applicant was employed as a receptionist when she sought preference as a professional psychologist. Pizarro v. I.N.S., 415 F.2d 481 (9th Cir. 1969).

This body of case law affords INS small comfort, and not surprisingly appellee asked the District Court to look elsewhere to find support for the INS decision.

The certification procedure

To understand the true meaning of Section 203(a)(3) and the scope of authority that it confers on INS to deny third preference, so appellee argued to the District Court,[28] it is necessary to read this section in conjunction with Section 212(a)(14) of the Act, as amended, 8 U.S.C. §1182(a)(14).[29]

28/ Defendant's Memorandum of Points and Authorities In Support of Motion To Dismiss Or In The Alternative For Summary Judgment, page 3.

29/ Appellee made the same argument to this Court in its Opposition To Motion For Stay Pending Appeal, page 6: "To appreciate what Congress intended to accomplish in enacting Section 203(a)(3) its provisions must be read in the light of restrictions placed on the eligibility of aliens to receive a visa and to be admitted into the United States imposed by Section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14)." And the District Director and Regional Commissioner also resorted to the same reasoning. See text of opinions at note 15 and page 11, supra.

We have looked very hard at Section 212(a)(14), which defines a class of persons who are not eligible to receive visas and who are excluded from admission into the United States, but its relevance to this case remains a mystery that we have not yet been able to solve. Since this provision has been relied upon so insistently by the government, we set it forth in full:

> "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a) (27) (A) of this title, (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a) (3) and 1153(a) (6) of this title, and to nonpreference immigrant aliens described in section 1153(a) (8) of this title; . . ."

The purpose of this provision, enacted in 1965, is to give American workers a measure of protection against job displacement and related adverse consequences -- such as lower wages or continued unemployment -- of immigration into this country by aliens. H. Rep. 745, 89th Cong., 1st Sess. (1965), at 14; S. Rep. 748, 89th Cong., 1st Sess. (1965), at 15. The protector is not INS but rather the Secretary of Labor. The Secretary's certification, issued under procedures that are the subject of detailed regulations [30/] and that in

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30/ The regulations appear in 29 C.F.R. §60 (1970), and as far as we can determine they were not significantly different when appellant applied for third preference in 1966. In general, the regulations provide a blanket certification for certain categories of employment (designated in a Schedule A) in which the Secretary has determined in advance that there is a deficiency and that the addition of aliens would not adversely affect the wages and working conditions of persons employed in the United States. 29 C.F.R. § 60.2(a)(1). As to other categories of employment (designated in a Schedule B), the regulations provide that the Secretary has determined in advance that no certification can be made. 29 C.F.R. § 60.2(a)(2). In

[footnote continued on page 20]

appellant's case called for the submission and consideration of Form ES-575A (see page 6, supra), signifies that the Secretary has performed his protective function. The INS plays no part whatever in this certification process except to solicit the completed form from the applicant and transmit it to the Department of Labor. We have already seen that appellant's Form ES-575A was returned to INS bearing the certification that she was eligible for third preference.

It may be doubted whether the certification procedure outlined by Section 212(a)(14) was even applicable in appellant's case, since she was not "seeking to enter the United States for the purpose of performing skilled or unskilled labor," as those words are commonly understood.[31] But we feel no need to pursue this line of thought. The facts are that the procedure was followed and that appellant was certified by the Department of Labor as eligible for third preference. We have simply not been able to make any progress in understanding how a procedure that appellant satisfied -- even if we assume that she was required to do so -- suddenly became in the hands of INS a bar to her application for third preference.

30/ [Cont'd from page 19]

some cases persons may qualify as professionals in a category of employment that is not listed in either Schedule A or Schedule B and as to which neither of the advance determinations applies. Teaching is such a category of employment that is not listed in either Schedule A or B. When a person applies for third preference as a professional in this category, the prescribed procedure is that INS solicits a completed Form ES-575A from the applicant and transmits it to the Department of Labor. A certification is then issued by the Department "if warranted by the circumstances at that time." 29 C.F.R. § 60.3(b).

31/ Our point here, if we felt compelled to make it, would be that the certification procedure applies only to those members of the professions who seek admission under a third preference for the purpose of performing some form of manual labor rather than for the purpose of practicing their professions. See Gordon & Rosenfield, op. cit. supra note 4, § 2.40, p. 2-196, suggesting that "predominantly mental occupations" may not be counted as "skilled or unskilled labor" in interpreting the reach of Section 212(a)(14).

The legislative history of Section 203(a)(3)

Appellee argued to the District Court that the legislative history of the 1965 amendments to the Act demonstrates that Congress did not intend to make third preference available to qualified members of the professions unless they have a present intention and capacity to practice their professions in the United States.[32] One ambiguous sentence taken from the House Committee report was the only citation offered in support of this argument.[33] In our view the language of Section 203(a)(3) leaves no room for such an argument. Congress could surely have added qualifying words of intention or capacity to practice to Section 203(a)(3), and the fair implication from its failure to do so is that no such limitations were intended. But we now show -- contrary to appellee's assertion -- that the legislative history also leads to the conclusion that Congress intended no such limitations.

Prior to the enactment of the 1965 amendments (P.L. 89-236), first preference in the issuance of immigrant visas under the Act was accorded to persons:

32/ Defendant's Memorandum of Points and Authorities In Support Of Motion To Dismiss Or In The Alternative For Summary Judgment, page 4. The same argument appears in appellee's Opposition To Motion For Stay Pending Appeal, page 7.

33/ The sentence relied on by appellee is: "Preference is also provided for those professional people, with personal qualifications, whose services are urgently needed in the United States." H. Rep. 745, 89th Cong., 1st Sess. (1965), p. 12.

> "whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States." 66 Stat. 178. 34/

One of the practical requirements in the administration of this provision was that the applicant have a specific job offer in the United States. The source of this requirement was the provision demanding that the petition for preference be filed by some firm or organization other than the applicant himself. 66 Stat. 179. 35/

The administration bill that, as amended, became P.L. 89-236 was introduced in 1965 as H.R. 2580 and S. 500. In its original form, this bill would have amended the Act to substitute the words "especially advantageous to" for "needed urgently in" as the standard for first preference. It would also have abolished, as at least four witnesses made absolutely clear in their testimony, the job offer requirement for first preference and enabled the applicant to file a petition on his own behalf. Testimony of Secretary of Labor Willard Wirtz, Hearings on H.R. 2580 before Subcommittee No. 1 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965), at 117; Testimony of Attorney General Nicholas Katzenbach, Abba Schwartz, Administrator of Bureau of Security and Consular Affairs, and Senator Robert Kennedy, Hearings on S. 500 before Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 89th Cong., 1st Sess. (1965), at 24, 198-199, 236-237. And see Preliminary Guidelines Suggested By Department of Labor for Administration of

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34/ Formerly 8 U.S.C. § 1153(a)(1).

35/ Formerly 8 U.S.C. § 1154(b).

First and Fourth Preference Provisions Proposed in S. 500, Id. at 85-86. In the form that was finally adopted, the old first preference was given a new ranking as the third preference, and it was modified by deleting any standard of need for the applicant's services and by making the preference benefit available simply to "members of the professions." The job offer requirement never reappeared and is not part of the existing law. 36/

The single most pertinent fragment of the legislative history that we have been able to find is an exchange between Congressman Moore of West Virginia and Secretary of Labor Willard Wirtz during consideration of H.R. 2580 by the House. Under discussion at the time of this exchange, 37/ which we reproduce below, was the feature of the bill eliminating the job offer requirement for first preference (later to become third preference) applicants:

> "MR. MOORE. Then I assume the reasoning you follow is that apparently there is something different, and unique, about the first-preference immigrant that will be coming in under the proposed legislation.
>
> Secretary WIRTZ. The difference being that a person who fits that description in terms of high education, technical training, specialized experience, and exceptional ability, and so forth, we would count so clearly and definitely a boon to the American culture and the American workforce that there is not the element of doubt, risk, or question, which would warrant our relying on the specific job order procedure.
>
> MR. MOORE. Even though he would not occupy one of the specific skills for which he merited consideration as first-preference quota."

36/ Compare Section 204(a) of the Act, as amended, 8 U.S.C. § 1154(a), with the provision that was formerly 8 U.S.C. § 1154(b).

37/ Hearings on H.R. 2580 before Subcommittee No. 1 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965), at 125-126.

"Secretary WIRTZ. Even though he left the occupational basis; yes.

MR. MOORE. He would not have to leave, because he is not coming for a specific job.

Secretary WIRTZ. That is why I hesitated in my answer a little bit. You see, the amendment in H.R. 2580 really removes, as far as the first-preference group is concerned, the point we are here talking about.

MR. MOORE. That is right. So he would be cut free to drift throughout the United States. I am not trying to be disrespectful to this new class of first preference at all. But to emphasize my point, he would be cut free to do anything he desires to do in the United States. And your answer, if I understand your answer, is that while this individual is highly trained, highly educated, has a skill or even if he an unemployed highly skilled, trained metallurgist, he is in that respect contributing to the culture and economic well-being of the United States.

Secretary WIRTZ. Where you say 'free to drift,' I say 'free to climb.' Really, that is the difference between us. My answer to your question with that amendment to it is, 'Yes, I think he should be free.'

MR. MOORE. I have no objection to his right to climb. I mean, my goodness, if he comes here and by application of his talents and dedication, discovers or has with him some uniqueness that projects him to the position of Secretary of Labor.

Secretary WIRTZ. That is drifting.

MR. MOORE. You may think that is drifting.

I think your answer indicates the very cleverness of how you would like for us to draw significance from the words 'drift' and 'climb.' I happen to think it would be one big jump.

Secretary WIRTZ. So do I.

MR. MOORE. But to me, if we are going to give these people in the first category the greatest preference, the highest percentage quota numbers, the greater portion of all the quotas and they can come to this country and I think this is a fair statement--under the proposed law they do not have to do a thing. Sure, they are intellectually free to inquire in all areas, but there is no requirement that they make any contribution by applying their skills. I say perhaps that

> might give a tendency for the individual to drift. I assume when he is drifting, he can still be learning and perhaps he will climb. But there is nothing in this bill that is going to assure us that we as a nation are to have any benefit from the talents of the intending immigrant of which we say we are in short supply.
>
> On the other hand, and I think this is probably a fair interpretation of your statement, Mr. Secretary, you have faith in the individual that he is going to use his education, and that the character and the background of the individual are such that he would not be inclined to drift, and, therefore, he would want to put his skill to work. I would assume that basically is your summation of what we consider to be a concern of the committee that he is not required to go into a specific job and your thought that he could perhaps go in one of a number of different areas.
>
> Secretary WIRTZ. I believe that is right."

What this exchange demonstrates, we think, is that Congress was fully aware when it created a preference for "members of the professions" that there was to be no requirement that the preferred immigrant practice his profession in the United States. This conclusion is strongly reinforced by the fact that several other important witnesses called the attention of the responsible committees to the abolition of the job offer requirement. And of course if there is no job offer requirement, the applicant's financial capacity to practice his profession in the immediate future -- the ground relied on by INS in denying third preference to appellant -- is not even a relevant consideration.

Conclusion

Whatever view is taken of the INS action in this case, it is clear that that agency exceeded its statutory authority in imposing a financial condition on appellant in her effort to obtain third preference. In one view INS in effect resurrected the job offer requirement that was deliberately abolished in 1965. In the other view INS in effect created a new category of persons who for reasons relating to their financial position are

ineligible to receive immigrant visas. In this latter regard, we note that 8 U.S.C. § 1182(a)(8) provides for the exclusion of persons who are "paupers, professional beggars, or vagrants," and that 8 U.S.C. § 1182(a)(15) provides for the exclusion of persons who "in the opinion of the Attorney General . . . are likely at any time to become public charges." The INS never claimed that appellant could be excluded on either of these grounds, and nothing in the Act empowers INS to establish new categories of persons not eligible for admission into the United States because of their economic circumstances.

II.

The procedures employed by INS denied appellant due process of law

We have argued to this point that INS acted in excess of its statutory authority in denying appellant's application for third preference on a ground other than professional status. We now show that even if the agency's legal theory can somehow be sustained, its procedures cannot be. Appellant was the victim of methods of investigation and adjudication that denied her due process of law in violation of the Fifth Amendment.

Loss of the transcript of the administrative proceeding

Preliminarily we think it is appropriate in this context to remind the Court that the INS action in this case was based on factual findings respecting appellant's financial condition and alleged indebtedness, and that these findings were in turn based on statements assertedly elicited from appellant during interrogation by three INS officials at the District Director level and during examination by the Regional Commissioner. INS has lost the

only transcript of these proceedings that exists. Even if some principle is at work here that limits the scope of the judicial review to which we are entitled, the INS determination cannot be upheld unless it is supported by substantial evidence. Kasravi v. I.N.S., 400 F.2d 675, 677 (9th Cir. 1968); Yau v. I.N.S., 293 F. Supp. 717, 721-722 (C.D. Cal. 1968). However, without the transcript that is said to contain the critical statements made by appellant, we cannot tell -- and we don't see how this Court can either -- whether the INS action can be sustained on this standard. This difficulty is aggravated by appellant's denial of the ultimate facts found by INS[38/] and by her denial that she even made the statements that in the view of INS support these findings.[39/] For these reasons the loss of the existing transcript by INS, apart from any other circumstance in the case, should preclude an affirmance of the agency's decision. See Lechich v. Rinaldi, 246 F. Supp. 675 (D. N.J. 1965) (reversing an INS denial of first preference, on the ground that the procedures were fundamentally unfair, where the reviewing official within the agency was directed not to consider a certain sworn statement that had been taken from a witness during the investigation). Otherwise judicial inquiry involving at least a review of the substantiality of the evidence will become for appellant an unfulfilled promise.

Appellant's right to be heard was denied

It is not open to dispute that the proceedings conducted by INS to determine whether applicants are entitled to visa preference must meet

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38/ Transcript of Proceedings in the District Court, January 6, 1970, page 5 (J.A.4

39/ See appellant's pro se Motion To Deny Defendant's Motion To Dismiss Or In The Alternative For Summary Judgment, at page 7, where she denies -- as she has repeatedly -- that she ever acknowledged to the Regional Commissioner -- as he claimed in his opinion set forth on page 11, supra -- that she had a total indebtedness of $30,000 (J.A. 33).

constitutional standards of procedural fairness. Tang v. I.N.S., 298 F. Supp. 413, 417 (C.D. Cal. 1969); Lechich v. Rinaldi, 246 F. Supp. 675, 684 (D. N.J. 1965). In appellant's case, where deportation was the expectable result following disapproval of her application, vital interests were plainly at stake. The Supreme Court has recognized the "drastic deprivations" that deportation may involve. Woodby v. I.N.S., 385 U.S. 276, 285 (1966).

It is not necessary to trace here the exact perimeter of what due process requires in a visa preference proceeding. Appellant's right to be heard was effectively denied by INS, and wherever due process applies the right to be heard is central. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Grannis v. Ordean, 234 U.S. 385, 394 (1914). This is a case of INS giving with one hand and taking away with the other. It afforded appellant a hearing but it reduced that hearing to an empty formality by procedures that afforded neither adequate opportunity to prepare nor adequate opportunity to defend -- and both these opportunities are elements of the right to be heard. Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970).

It is self-evident that the ability to prepare for any sort of hearing conducted by government officials is directly related to the scope of the notice of the matters to be discussed. The written notice given to appellant by an INS District Director simply advised her of the pendency of an appointment that would concern her application for third preference. This was a delphic notice indeed if, as in fact happened, appellant was to be

called upon to explain business activities in which she had been involved over a period of more than 10 years. Its camouflage was even more perfect if, as claimed by appellant,[40/] it was coupled with oral assurances that her professional qualifications as a teacher were to be the topic of conversation.

The gulf between the subject matter suggested by the notice and the subject matter actually discussed produced a predestined result at the hearing held on December 27, 1966. Appellant, placed under oath and examined at length, was apparently unable to give a detailed accounting of her financial affairs. What concerns us, of course, is not so much that the hearing was unproductive -- although with proper warning appellant might well have given a satisfactory account. What concerns us is that INS drew adverse inferences respecting appellant's credibility, on which its action appears to have been based at least in part, from the asserted fact that she was "evasive, verbose, and vague" in response to questions[41/] -- a fact which if true was a natural product of the notice procedure employed by INS itself.

Lack of assistance of counsel

Appellant was not represented by counsel at any stage of the administrative proceedings. This fact assumes a special importance in light of what has been shown about the procedural infirmities of those proceedings. While we do not ask this Court to hold that an applicant for visa preference

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40/ See note 13, supra.

41/ See opinion of District Director at note 15, supra.

has an absolute right to counsel during an INS investigation of his application, what we do maintain is that in the absence of counsel the INS must be held to a scrupulous regard for the applicant's procedural rights. Doubts, that is, that might be resolved against an applicant were she represented by counsel should be resolved against INS where applicant acted pro se.

In the case at bar, for example, should it be thought that an applicant represented by counsel would have taken the steps necessary to find out what subjects would be explored at the INS hearing, no such assumption -- which we would think unwarranted in any case -- can be indulged where the applicant is unrepresented. Moreover, the District Director's finding that appellant did not intend to teach except in the school she wanted to establish (see supra note 15) -- a finding that the Director at least thought relevant even though the Regional Commissioner evidently did not -- might well have been based upon the sort of responces to ambiguous questions that are given by uncounseled witnesses. It is hard to believe that, had appellant fully appreciated the meaning of a question as to whether she intended to teach even though her plans for her own school did not bear fruit, she would have responded in the negative. Nothing whatever in this record or in common sense suggests any possible reason for such a response. And yet evidently the District Director seized upon something appellant said during the hearing -- though because of the loss of the transcript no one can tell what -- as being just such a strange disavowal of an intention to teach elsewhere. Surely had appellant been represented by counsel alert to the significance of whatever question was put to appellant on this score, the record would not, even ambiguously, have permitted the District Director to draw any such conclusion against appellant.

CONCLUSION

We have shown that neither the legal principles nor the procedures utilized by INS in denying a third preference classification to appellant can be sustained. For these reasons the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the Brief For Appellant was served on the appellee by mailing copies, first class postage prepaid, to Will Wilson, Assistant Attorney General of the United States, and Paul C. Summitt of the Department of Justice, at their offices in the Department of Justice, Washington, D. C., and to Thomas A. Flannery, United States Attorney for the District of Columbia, at his office in the United States Court House, Washington, D. C., on this 1st day of June, 1970.

William H. Dempsey, Jr.

No. 23993

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

HELENA HILDA BUTTERFIELD, APPELLANT

v.

ATTORNEY GENERAL OF THE UNITED STATES, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the district director erroneously denied appellant's application for a third preference visa classification as a professional (teacher) under the immigration laws on the ground that, in view of her stated intent and purpose to teach in an international cultural school which she would herself establish, manage, and control, she lacked the financial means and the ability to pursue her profession in this way in the immediate or foreseeable future and, indeed, was already deeply in debt in connection with such "professional" activities.

2. Whether the procedures followed in determining appellant's preference application were fair.

COUNTERSTATEMENT OF THE FACTS

Appellant, a fifty-two-year old citizen of Great Britain born in India of English parents, entered the United States on January 8, 1962, as a nonimmigrant visitor authorized to stay until July 7, 1962.

Appellant overstayed her departure time and was ordered to show cause why she should not be deported for remaining in the United States for a longer period than authorized. In deportation proceedings under Section 242(b) of the Immigration and Nationality Act (8 U.S.C. 1252(b)) held in San Francisco, a Special Inquiry Officer found her deportable as charged on March 22, 1963. He granted her application for voluntary departure in lieu of deportation and provided that, in the event she failed to depart voluntarily as directed by the district director, she would be deported to Great Britain. Appellant failed to take an appeal to the Board of Immigration Appeals.

Appellant's departure was delayed by the introduction of several successive private bills in Congress. Finally, she was directed to depart the United States no later than October 10, 1964. This time was later extended to November 10, 1964, upon appellant's assurance that she would depart. However, she failed to depart as directed. Therefore, in accordance with the Special Inquiry Officer's order, the deportation order was automatically entered. A Warrant of Deportation was issued on November 12, 1964.

Appellant ignored directions to report at Los Angeles for deportation on November 27, 1964. Efforts to locate her were unsuccessful for a period of time. In mid-December 1964, she was located working for the Australian Embassy in Washington, D. C.

After another adverse result on obtaining relief through Congress, and several extensions of time in which to file a preference petition, on January 17, 1966, appellant filed with the local district director a petition pursuant to Section 203(a)(3) of the Immigration and Nationality Act, as amended October 3, 1965 (8 U.S.C. 1153(a)(3); 79 Stat. 912-915), for a third preference professional classification for quota immigration purposes. Such preference for quota immigration purposes is extended to qualified immigrants--

> who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.

In her application, appellant listed her occupation as "president: Director - Educational and Cultural Organization" and stated that she intended to engage in her occupation in the United States by operation of an "international cultural centre - promoting courses in language, history, literature, musical activities, concerts." Appellant indicated her profession as teaching and provided supporting evidence of her academic qualifications--B.A. degree at the University of Wales in 1951--and teaching experience consisting predominantly of activities relating to establishment and operation of "cultural centers" in Rome and London. 1/

1/ Appellant correctly observes (App. Br. p. 7) that the administrative authorities were aware that she was by training and experience a teacher and that the denial of her preference application was not based on deficiencies in her credentials as a teacher.

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1/ Appellant correctly observes (App. Br. p. 7) that the administrative authorities were aware that she was by training and experience a teacher and that the denial of her preference application was not based on deficiencies in her credentials as a teacher.

An extensive investigation was conducted pursuant to Section 204 of the Act, 8 U.S.C. 1154, including an interview with appellant on December 27, 1966.[2/] In addition to the memorandum to files concerning appellant's interview, the certified administrative record on file with this Court, particularly Gov't Exh. A, contains information relating to appellant's financial condition during a period of approximately eleven months preceding the Regional Commissioner's decision. On April 15, 1966, appellant entered into a preliminary purchase agreement for real property in this city at a price of $225,000. Under the terms of the agreement, appellant was to make two payments in May 1966 of $500 each for occupancy starting April 16, 1966. This amount of $1000 was not to apply to the purchase price. The following payments were also to be made as indicated and were to apply towards the purchase price:

1) $1000 per month on the existing second trust payable on the 20th of each month beginning April 20, 1966, and ending November 1, 1966, a total of approximately $7,333.

2) $939 per month on the existing first trust, beginning May 1, 1966, and ending November 1, 1966, a total of $6,573.

3) $1000 during May 1966.

4) $1000 during June 1966.

5) $8,000 on July 1, 1966.

2/ The interview was under oath and was recorded in shorthand by a stenographer. It was never transcribed. A diligent search has been made by the district director and counsel for appellee to locate these shorthand notes without success. The substance of the interview is reflected in the administrative file by a memorandum summary (App. pp.8-9).

"App." refers to the separate Joint Appendix filed in this case. Appended to appellee's brief are copies of an unreported court decision and two Labor Department Bulletins, which will be cited as "Appellee's Appendix".

6) $15,000 on August 1, 1966.

7) $30,000 on October 1, 1966.

8) Balance of $29,170.22, including escrow money and $5,000 for painting, on November 1, 1966.

Thus, under the terms of the foregoing agreement, appellant undertook to make installment payments of $98,076.22, representing the seller's equity, and also undertook to assume after November 1, 1966, the existing first and second trusts totaling some $125,000. She also agreed to pay an additional $1000 on the occupancy agreement. According to her later admissions, at the time she made this agreement she had no assets. Apparently, she also had no one who could ensure that she could make these heavy payments over a comparatively short period of time. She expected to establish a school on the property and probably expected thereby to obtain financially responsible sponsors.

In any event, appellant took occupancy under the agreement and operated the property under its existing use permit as a boarding house. She was unsuccessful in her attempt to obtain a permit for a school and cultural center.

Appellant made nothing but insignificant payments under the agreement. On October 4, 1966, she was evicted by court order, and the property was restored to the seller. The record also contains, inter alia, records of overdue bills, unsatisfied judgments, and a letter to the Immigration Service from an indignant vocal contest winner complaining about appellant's default on her first prize won in one of appellant's "cultural events." Attached to that letter was a copy of appellant's delinquent promissory note for $3,000.

On January 10, 1967, the district director denied appellant's preference application on the following basis (App. pp.10-11):

> You have based your claim to Third Preference classification under Section 203(a)(3) of the Immigration and Naturalization Act on your qualifications as a teacher and your experience in opening and directing schools and cultural centers. You have stated that it is your intention to teach only in a school established and operated by you. You state that it is your intention also to establish and operate a cultural center.
>
> The record in your case shows that while pursuing your profession in the United States since 1962 you have accrued a series of debts in California and in Washington, D. C. which are still outstanding. Local credit bureau records show that you owe a total of $3,851.16 to eight firms in the District of Columbia.
>
> Three creditors have obtained judgments against you but the debts are still unpaid. The record shows that you failed to pay a $3,000.00 prize to the winner of a vocal contest you promoted in San Francisco in 1963. The record also shows that you have attempted to establish a school and cultural center in the United States and have failed to do so.
>
> The phrase "for the purpose of performing", in Section 212(a)(14), clearly indicates that an immigrant alien within the contemplation of Section 212(a)(14) must establish a bona fide intent to engage immediately or in the foreseeable future in his profession or a related field (Matter of Semerjian, Interim Decision 1627).
>
> On December 27, 1966 at an interview at this office, you were appraised of the record of your failure to pay your debts and your failure to establish a school or cultural center in the United States. You were given the opportunity to show that you have the financial means to establish a school or a cultural center in the immediate or foreseeable future. You failed to do so.

On appeal, the Regional Commissioner, by order entered March 3, 1967, affirmed the district director's denial of the petition, and dismissed the

appeal, stating (App. pp.12-13):

> under Section 203(a)(3) and (6), commonly termed the third and sixth preferences, respectively, represent the Congressional desire to benefit the United States by favoring "professional people, with personal qualifications, whose services are urgently needed in the United States" (H. Rep. 745, 89th Cong., 1st Sess., p. 12) and, to a lesser extent, so-called

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3/ Section 203(a)(3) and (6), 8 U.S.C. 1153(a)(3) and (6), provides that:

> (a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> * * *
>
> (3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a)(ii) of this title, to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.
>
> * * *
>
> (6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

On March 9, 1967, appellant was notified to report for deportation on March 23, 1967. On March 22, 1967, she filed the instant Petition for Review

"skilled or unskilled" persons capable of filling labor shortages in the United States (Id. at 12, 20). Congress did not leave it to conjecture that it wanted to fully protect American labor from the impact of aliens immigrating to the United States to enter the work force under both of these preferences. In Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14), Congress created a class of aliens "ineligible to receive visas" and excludable from "admission into the United States" as follows:

> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8); . . . [Emphasis added.] 4/

4/ Appellant expresses some doubt that professionals, such as teachers, fall within the boundaries of "skilled or unskilled labor" within the meaning of this labor certification provision (App. Br. 20). As we show in our analysis of the legislative history of the preference provisions and the labor certification limitation, infra pp.25-27 , Congress clearly intended those terms to encompass all aliens immigrating to the United States primarily for gainful employment, including professionals.

This Congressional scheme shows that Congress intended that the preference quotas allotted to alien members of the professions, and those with exceptional ability in the arts and sciences, as well as those aliens with lesser skills, would go only to persons with the bona fide intent and capability of practicing their qualifying profession or occupation in the United States either immediately or within the foreseeable future. As stated in Matter of Semerjian, 11 I & N Dec. 751, 754 (Reg. Comm., 1966):[5/]

> Thus, it appears to be clear that it was the Congressional intent to award a preference classification to members of the professions, in contemplation that they would perform needed services for which their professional status qualified them. It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as a member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.
>
> Since an applicant for a visa under section 203(a)(3) may be a member of a profession for which a license, or even citizenship, may be a prerequisite before he may engage in his professional endeavor, we do not read into the statutes or regulations a requirement that the applicant must be able to engage in the qualifying profession immediately, if admitted to the United States. It is sufficient if he can show a bona fide purpose or intent to work in the United States in his qualifying endeavor. In determining whether the alien intends to engage in his profession or in a field related thereto, consideration may be given to facts such as whether he is presently so employed and, if not, the length of time he has not been so employed and the reason therefor. Consideration may also be given to the alien's own declaration regarding his intended employment.

5/ Accord, Matter of Chu, Interim Dec. #1936 (Reg. Comm., January 20, 1969); Matter of Maher, 12 I & N Dec. 680 (Reg. Comm., 1968); Matter of Din, 12 I & N Dec. 413, 414-415 (Reg. Comm., 1967); Matter of Bun, 12 I & N Dec. 765, 767 (Reg. Comm., 1967); Matter of Naufahu, 11 I & N Dec. 904, 907 (Reg. Comm., 1966). The only judicial decision to our knowledge directly in point is an unpublished decision in Jerry Teh Fong Tang v. District Director, Central District of California, Civil No. 68-757-R, entered July 15, 1968, which we are reproducing in Appellee's Appendix to this brief, pp. 1a-5a .

Congress did not intend for professional and labor quota preferences to go to immigrants who would not or could not use their professional or specific talents here but, instead, would compete in a job market for which they were not granted a preference and had not obtained a labor certificate required by Section 212(a)(14). In our view, it is a drastic and basic departure from the statutory policies to grant a preference based on a shortage in one occupational category when the alien intends or circumstances show that he will in fact compete, if at all, in another occupation, professional or otherwise. Not only does the United States get no benefit from the skills but other workers may be adversely affected.

In the instant case, appellant filed her application for a preference on her own behalf based on her qualification as a teacher and experience in opening and directing schools and cultural centers. She stated that she would engage in the operation of international cultural centers promoting courses in languages, history, musical activities, and concerts. The district director and regional commissioner concluded on more than ample evidence that plaintiff was financially incapable of carrying out her stated intention. Being unable to bring her ambitious plans to fruition and with increasing debt, she has maintained herself in the United States in a variety of endeavors completely unrelated to her profession. The burden of proof was on her to show that she had a bona fide intent and capability to practice her profession in the foreseeable future.[6/] Although this is an unusual case in

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6/ "Every immigrant shall be presumed to be a nonpreference immigrant until he establishes to the satisfaction of the consular officer and the immigration officer that he is entitled to a preference status." Section 203(d) of the Act, 8 U.S.C. 1153(d).

that it involves apparent inability to engage in the intended professional activity successfully rather than the clear cut specific intent to engage in a non-approved occupation, there is no sound reason in policy or otherwise to apply a different rule. Certainly it cannot be accomplished on the basis of the policies underlying the labor certification and the third and sixth preferences--benefit to the United States coupled with protection of the American labor force.

It is no answer to say, as appellant does (App. Br. 19-20), that the Secretary of Labor is the protector of the labor market, not the Immigration and Naturalization Service. The Secretary of Labor performs no investigation into the bona fides of the skill under consideration or the immigrant's employment intentions or capabilities. It is the Immigration Service, after consultation with the Secretary of Labor, that has been tasked to investigate the claim for preference status and determine the merits of the matter. Section 204 of the Act, 8 U.S.C. 1154. In determining labor certifications, the Secretary of Labor simply applies his expert knowledge of the economy and labor markets to an application to determine whether United States workers will be adversely affected. He makes no inquiry, apart from the application, into the immigrant's actual qualifications or actual intention to proceed to a specific area of the country to successfully engage in a specified occupation immediately or within the foreseeable future. On its face, the labor certification is worthless in terms of protecting American labor unless these basic facts are accurately before the Secretary of Labor. Under the statute, it is the Immigration Service that is responsible for insuring the

integrity of these facts. Whether this responsibility is met by holding the labor certificate invalid in exclusion or deportation proceedings as based on erroneous information[7] or by finding that the alien is not entitled to the preference at the preference petition stage,[8] this is an appropriate determination for the Attorney General.

In our view, the legislative history demands this approach to preference petitions.

LEGISLATIVE HISTORY OF OCCUPATIONAL PREFERENCES AND LABOR CERTIFICATION PROCEDURES

Sections 203(a)(3) and (6) and 212(a)(14) of the Immigration and Nationality Act establishing present occupational preferences and labor certification requirements were enacted into law as Public Law 89-236 on October 3, 1965.

Prior to these amendments, members of the professions, arts and sciences, and skilled labor came under the first preference allocating visas to, among others, qualified quota immigrants "whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial

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7/ See, e.g., Matter of Santana, Interim Decision #1999 (Board of Immigration Appeals, August 15, 1969); Matter of Welcome, Interim Decision #1997 (Board of Immigration Appeals, August 6, 1969); Matter of Poulin, Interim Decision #1973 (Board of Immigration Appeals, May 2, 1969); Matter of Cardoso, Interim Decision #1963 (Board of Immigration Appeals, April 25, 1969).

8/ See cases cited, supra, p. 11.

prospectively to the national economy, cultural interests, or welfare of the United States * * *" Section 203(a)(1) of the 1952 Act, 66 Stat. 163; Gordon and Rosenfield, Immigration Law and Procedure §§2.27d and 2.27i (1969). These first preference aliens had to be coming to a particular employer in the United States who filed a petition on their behalf with the Attorney General (Section 204(b) of the 1952 Act, 66 Stat. 179; Gordon and Rosenfield, supra, §2.27d); however, they were not subject to any kind of labor certification procedures.

The limited labor certification procedures in the 1952 Act, insofar as pertinent here, applied only to skilled and unskilled labor in the non-preference part of the fourth preference category of quota immigrants under Section 203(a)(4) (66 Stat. 178), which consisted of a sub-preference for certain relatives of United States citizens and a nonpreference quota allocation. See Section 212(a)(14) of the 1952 Act, 66 Stat. 183. This restriction was in negative terms, excluding such nonpreference fourth preference immigrants seeking to enter the United States for the purpose of performing skilled or unskilled labor only if the Secretary of Labor had determined that

> (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and the place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions for the workers in the United States similarly employed.

Qualified immigrants in the nonpreference part of the fourth preference were never subject to job offer requirements or normally any other labor restrictions; however, once the Secretary of Labor issued a certification for occupations and localities, a job offer for such immigrants falling within the certification would have been to no avail in obtaining a visa.

In this statutory context, after a number of prior attempts to modify or eliminate the national origins quota system, the administration sponsored H.R. 2580 in the 89th Congress to amend the immigration laws. An identical bill was introduced in the Senate (S. 500). Section 10 of this bill proposed to amend Section 203(a)(1) by deleting "needed urgently in" and substituting the words "especially advantageous to" to lower the criteria for first preference immigrants. Section 10 also proposed to create a new sub-preference under the fourth preference for "qualified quota immigrants capable of performing specified functions for which a shortage of employable and willing persons exists in the United States * * *"[9/] Section 11 of the proposed bill deleted from Section 204(b) the requirement of a job offer

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9/ The analysis of the bill (111 Cong. Rec. Part I, p. 648) explained that the Section 10 amendment

> relaxes the test for the first preference accorded to persons of high education, technical training, specialized experience, or exceptional ability. Under present law, such persons are granted preferred status only if the Attorney General determines that their services are "needed urgently" in the United States. The amendment allows them first preference if their services, as determined by the Attorney General, would be "especially advantageous" to the United States.
>
> * * *
>
> * * * It also grants a subsidiary [fourth] preference to qualified quota immigrants capable of filling particular labor shortages in the United States. Under present law, immigrants who do not meet the rigorous standards of the skilled specialist category are not preferred over any other immigrants even though they can fill a definite labor need which other immigrants cannot fill. The amendment allows to such immigrants a preference of 50 percent of the quota visas remaining after all family preferences have been satisfied or exhausted.

for first preference immigrants to permit the alien himself to petition the Attorney General and imposed a job offer requirement on the new shortage of labor sub-preference within the fourth preference of Section 203(a)(4).[10/] The proposed bill did not contain any changes to the labor exclusion provision of subsection (a)(14). Neither the first preference nor the newly created labor preference within the fourth preference were subject to the labor certification control.

All of the testimony by administration officials cited by appellant (App. Br. 22-25) as favoring an abolition of a requirement of job offers and complete freedom of choice of employment for highly trained first preference aliens is directed at this original bill. This original bill, however, came through the legislative process beyond recognition.

10/ The bill analysis as to Section 11 stated (111 Cong. Rec. Part I, p. 648):

> Paragraph (2) also exempts first preference skilled specialists from the present petition procedure because under the bill a new procedure is established for such persons. Under present law, skilled specialists may qualify for preferred status only when a petition requesting their services is filed by a U.S. employer. This requirement unduly restricts our ability to attract those whose services would substantially enhance our economy, cultural interests, and welfare. Many of these people have no way of contacting employers in the United States in order to obtain the required employment. Even if they knew whom to contact, few openings important enough to attract such highly-skilled people are offered without personal interviews, and only a few very large enterprises or institutions have representatives abroad with hiring authority. Thus many such skilled specialists cannot obtain the employment presently required for first preference status.
>
> Moreover, the requirement of prearranged employment is in fact unnecessary. Highly skilled specialists would obviously work at their speciality, provided that employment is open. The only check needed is that the Attorney General ascertain, upon consultation with appropriate Government agencies, that job openings exist in the specialist's particular field. Although the present petition procedure serves to confirm the individual's own evidence of his training, education, or skills, such confirmation is not essential if proper investigation is made of his

(Footnote 10 continued on page 18.)

H.R. 2580 as finally enacted as Public Law 89-236 had a completely different structure and emphasis. It created seven preference categories to replace the original four. Insofar as pertinent here, the third preference applied to "qualified immigrants" who are members of the "professions" [11] or who would "substantially benefit prospectively the national economy, cultural interests, or welfare of the United States" because of their exceptional ability in the arts or sciences. Although this preference included the highly trained employment skills normally considered professional, as did the prior first preference, it also clearly included broad categories of persons

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(Footnote 10 continued from page 17.)

qualifications before the preference is accorded.

> Paragraph (5), therefore, allows the Attorney General to grant a first preference to skilled specialists upon their own petitions, supported by such documentation as the Attorney General shall require. In this connection it is to be noted that the existing law requiring an investigation by the Attorney General of the petitioner's qualifications and a determination of his eligibility for a first preference is continued. [Emphasis added.]

11/ Section 101(a)(32) of the Act, 8 U.S.C. 1101(a)(32), defined "profession" to include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers.

qualified in the traditionally "self-employed" professions, such as doctors and lawyers. The sixth preference, encompassing lesser employment skills, was reserved for the nonprofessional "specified skilled or unskilled labor * * * for which a shortage of employable and willing persons exist in the United States." The purpose of both provisions emphasized benefit to the United States, as under the prior law.

Section 204 under the new Act, 8 U.S.C. 1154, as amended, which prescribes the procedure for petitioning the Attorney General for preference, understandably provides for a third preference alien to petition on his own behalf and limited the sixth preference alien to a petition filed by his prospective employer. Unlike the original proposal in H.R. 2580, which permitted only the first preference alien himself to petition the Attorney General, the new Section 204 also made allowance for third preference petitions to be filed on the alien's behalf by third persons. In the Section analysis of the new Section 204, Congress eliminated all reference to dropping job offer requirements and the assumption that highly skilled workers would work within their field if such employment were available, stating simply that Sections 204 and 205 "are revised to establish a single procedure for the filing of petitions with the Attorney General to accord * * * preference status * * *" H. Rep. 745, 89th Cong., 1st Sess., p. 20 (1965); S. Rep. 748, 89th Cong., 1st Sess., p. 23 (1965). In our view, just on the clear intent of Congress to insure benefit to the United States by admitting professionals and other skills needed in this country, it would have been

reasonable to interpret these statutory provisions as imposing a requirement that such preference immigrants intend at the time of their entry to enter their occupation at least in the foreseeable future.

This, however, does not end the inquiry. Although, as appellant has pointed out in an extended quotation (App. Br. 23-24), Secretary of Labor Wirtz was willing to afford first preference to highly trained aliens "advantageous to the United States" regardless of whether they were likely to pursue a different occupation than the one upon which they were granted a preference, the legislative history shows that organized labor did not support such a position and that Congress resolved the matter in favor of organized labor. Contrary to appellant's assertion (App. Br. 23), the "single most pertinent fragment of the legislative history" is an exchange between members of Subcommittee No. 1 of the House Judiciary Committee and representatives of the AFL-CIO. Hearings on H.R. 2580 before Subcommittee No. 1 of the House Judiciary Committee, 89th Cong., 1st Sess., pp. 25-27, 29 (1965). This exchange, reproduced below, indicated the concern of both committee members and organized labor with Secretary Wirtz' position and began the process that led Congress to strengthen controls to protect the American labor market from an influx of both skilled and unskilled foreign labor without regard for job offers by amending Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14):[12/]

> MR. MOORE. Mr. Biemiller, I very much appreciate your statement. I think it is very clear and concise and states the position of the AFL-CIO.

12/ Congress acted upon the amendment expressly upon the recommendation of the AFL-CIO. 111 Cong. Rec. Part 16, p. 21586.

I would particularly like to ask you about the observations you make concerning the Secretary of Labor and the new area of responsibility you would prefer to see go to him.

Have you had the opportunity to review his testimony before this subcommittee?

MR. BIEMILLER. Not before this subcommittee, no.

MR. MOORE. The Secretary made some interesting observations. In light of your suggestions I am wondering whether you would find yourself at odds with the Secretary of Labor. I assume you would not, but it seems to me that you are suggesting here that the jobs that are going to be filled by immigrant labor be permanent jobs and not temporary in nature. Specifically, while you tie that into the seasonal aspect, the bracero program, and the stoop labor admissions that are occurring, I assume your statement is general in nature, that it applies in scope to the broad spectrum of jobs in all areas in the country and it is not simply limited to the seasonal job.

MR. BIEMILLER. The resolution adopted by our executive council is firm on this.

MR. MOORE. And very broad?

MR. BIEMILLER. Yes, sir.

MR. MOORE. The Secretary of Labor indicated that he was not too concerned about the fact that this legislation did not require a specific job to be available to the intended immigrant. I refer now to the skilled area. He also indicated that he felt the country was benefited, even though the individual ultimately came over here and was unemployed. He felt from perhaps background, education, and otherwise the immigrant would add to the intellectual climate. That is slightly at variance with your suggestion, is it not?

MR. BIEMILLER. Not necessarily, because people in the intellectual community are not always people who have a job. You get into the whole field of freelancers in this area.

MR. MOORE. The vehicle he uses to come here is that he has a skill for which there is a shortage in the United States.

MR. BIEMILLER. That is right.

MR. MOORE. It is my understanding that your endorsement of this legislation is along the lines of the suggestion of President Johnson that you do not ask from what country they come but what they can do for our country.

MR. BIEMILLER. What they can do for our country.

MR. MOORE. I would think from that endorsement that you feel this individual should be making a contribution in this country, and in the light of your resolution there should be a permanent job to which he is going.

MR. BIEMILLER. This is correct.

MR. MOORE. The present law sets up a system of first preference, where an employer who finds himself in need of a skill that is not available in the United States makes application, and the intending immigrant, skilled as he might be, comes to that job.

MR. BIEMILLER. That is right.

MR. MOORE. I assume that is exactly what you have in mind.

MR. BIEMILLER. Precisely.

MR. MOORE. Under the administration bill this would no longer be the case. I am sure you are aware of this. It bothers me just a little bit that there would be established a number of skills in which there are shortages in the United States, and if a person from any country of the world could fill or qualify to fill any one of those shortages he would automatically come to the United States and have no job in mind.

Is this not a little at variance from what you would like to see happen?

MR. MEIKLEJOHN. I do not think it is, Congressman Moore. The law as I understand it at the present time does not permit this to happen. There is nothing in this bill to change that situation, is there?

MR. MOORE. Yes there is, sir.

MR. MEIKLEJOHN. I am not aware of it.

MR. MOORE. There is a change in language completely. That is the reason I was very interested in your presentation this morning, Mr. Biemiller, because it goes into an area about which some of us on this committee have had some concern in light of the labor complications involved.

MR. MEIKLEJOHN. Our concern goes mainly to the question of who is to make the determinations as to the existence of a skill shortage, and whether in a given situation this skill shortage, if it is found to exist, is to be filled through the importation or immigration of persons from abroad.

MR. MOORE. But as I understand your presentation this morning, and I would agree with this finding you want and where you want to place the administrative authority, you still have this overriding suggestion in your testimony that he should be coming to a permanent job to contribute that skill which we find--

MR. MEIKLEJOHN. Not necessarily a particular job. We do not feel that it is necessary that there must be a particular job for which he comes to the United States.

MR. MOORE. You say permanent job in your statement. You express concern about it.

MR. MEIKLEJOHN. We say the jobs must be permanent in nature.

MR. MOORE. And not temporary.

MR. MEIKLEJOHN. Yes.

MR. BIEMILLER. I think possibly we can clarify this, Congressman, by pointing out that what we are talking about, and I am just using an arbitrary skill at the moment, is this: If we are to admit 100 tailors we want to be sure that there is a shortage of 100 tailors on a permanent basis and not that this is a shortage for 6 months of 100 tailors.

MR. MOORE. I would certainly agree with that.

MR. BIEMILLER. I think this is the essence of what we are after.

I would think this means that in most cases you would have to actually have the employer available, the XYZ company, ABC company, and so on.

MR. MOORE. Such is not the case under this administration bill. I would assume that with that representation that you would like to see that firmed up?

MR. BIEMILLER. Right.

MR. MOORE. The thing that bothers me here, very frankly, is just the reverse of the picture that you present, and by reversing it we confirm your concern, I believe. If there is an established category of a shortage in which 100 skilled individuals come into this country, you want them going to jobs in which that skill would be needed and they would not break out generally into the labor force and find themselves in competition, we shall say, for jobs for which there is no shortage in this country. This really concerns us.

We are a little at variance, and we have been, with the Secretary of Labor in this area. I want to be perfectly fair in recalling his testimony, but he does not seem to be as genuinely concerned about this as we have been. Frankly we do not want the provisions of first preference of H.R. 2580 used as a vehicle of a mass importation of workers in skill shortage areas, and then not have those imported workers, or that immigrant, go to that shortage area but to fan out throughout the country and find himself in competition with the American worker for which there is no shortage today.

We are at a slight variance with this and I am very pleased to see your very firm position with respect to it.

* * *

MR. RODINO. * * *

Some of the proposals to which you direct our attention I think are worthy of consideration.

Indeed, there is substantial merit especially with regard to those just discussed in the colloquy between you and Mr. Moore relating to the necessity of insuring that the people who are permitted to come to our shores, who are in fact invited, are not those with no job in sight, nor those who may come at a time when there may be an unemployment situation which might be aggravated.

I think this is a worthwhile proposal to bear in mind.

I assure you that we want to recognize, always, the interest of the domestic worker.

The result was Section 212(a)(14), as amended, making significant changes in method and scope of operation of the labor exclusion provision. It now provided for exclusion of aliens seeking to enter the United States for the purpose of performing "skilled or unskilled labor" unless the Secretary of Labor has affirmatively certified that there are not enough workers in the United States at the place to which the alien is destined to perform such work and that employment of such aliens would not adversely affect wages and working conditions of United States workers similarly employed. Unlike the prior provision, the new labor certification provision expressly made these conditions applicable to third and sixth preference, as well as nonpreference. Repeatedly throughout the consideration of the bill, Congress is assured in various ways that the provision is applicable to all immigrant worker classes and that it will assure exclusion of aliens likely to displace qualified American workers or adversely affect his wages. The following are examples:

> This provision is applicable to immigrants from the Western Hemisphere, nonpreference immigrants, as well as those preference immigrants who seek entrance into the United States for the primary purpose of gainful employment whether it be in a skilled or semiskilled category or as a member of the professions or the arts. H. Rep. 745, 89th Cong., 1st Sess., p. 14; see also S. Rep. 748, 89th Cong., 1st Sess., p. 15.
>
> The Secretary of Labor under the language in the bill will be required to make a finding in the case individually that immigrants will not take a job for which there is a willing American worker nor upset the wage scales in the area. 111 Cong. Rec., Part 16, p. 21572.
>
> New labor controls are established on the admission of all immigrant worker classes. These new controls require the Secretary of Labor to make an affirmative finding on an individual case basis. The job the immigrant worker will fill in the locality to which he is destined must be one where there is no willing, qualified, and available American worker. 111 Cong. Rec., Part 16, p. 21579.

MR. MOORE. Such is not the case under this administration bill. I would assume that with that representation that you would like to see that firmed up?

MR. BIEMILLER. Right.

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> This provision is applicable to immigrants from the Western Hemisphere, nonpreference immigrants, as well as those preference immigrants who seek entrance into the United States for the primary purpose of gainful employment whether it be in a skilled or semiskilled category or as a member of the professions or the arts. H. Rep. 745, 89th Cong., 1st Sess., p. 14; see also S. Rep. 748, 89th Cong., 1st Sess., p. 15.
>
> The Secretary of Labor under the language in the bill will be required to make a finding in the case individually that immigrants will not take a job for which there is a willing American worker nor upset the wage scales in the area. 111 Cong. Rec., Part 16, p. 21572.
>
> New labor controls are established on the admission of all immigrant worker classes. These new controls require the Secretary of Labor to make an affirmative finding on an individual case basis. The job the immigrant worker will fill in the locality to which he is destined must be one where there is no willing, qualified, and available American worker. 111 Cong. Rec., Part 16, p. 21579.

> It is my understanding that when an immigrant seeks admission under these categories as special immigrants or preference immigrants and a determination by the Secretary of Labor is required, the Secretary will make a certification in the case of the individual immigrant. He will ascertain the prospective immigrant's skill and will match those skills with the employment and manpower reports he has available from the labor market where the immigrant expects to reside. On the basis of such an analysis the Secretary will be in a position to meet the requirement of the law, and provide the type of employment safeguards sought in this legislation. 111 Cong. Rec., Part 18, p. 24239.
>
> For those who are worried about increasing unemployment rolls, let me point out that no one--not a preference immigrant, a nonpreference immigrant, or a special immigrant from the Western Hemisphere--may enter without prior certification by the Secretary of Labor that he will not be taking the job of another American. 111 Cong. Rec., Part 18, p. 24470.

See also, e.g., 111 Cong. Rec., Part 16, pp. 21586, 21589, 21593, 21597, 21757-21758, 21771; 111 Cong. Rec., Part 18, pp. 24227-24228, 24233, 24442, 24500, 24564, 24774-24775, 24781-24782.

Also enlightening is the explanation of the preferences and labor certification promulgated by the chairman of Subcommittee No. 1 of the House Committee on the Judiciary in a subcommittee print entitled "Explanation in Question and Answer Form of the Immigration Act of October 3, 1965":

> Question 17. Have any new qualitative controls been added to the law?
>
> Answer. Yes. New labor controls have been added to the law to protect American workers and their standards of employment.
>
> Question 18. How will these new labor controls be applied?
>
> Answer. The Secretary of Labor is required, in the case of all worker immigrant classes, to make an affirmative finding that there are no willing and able American workers to fill the particular employment opportunity the immigrant is scheduled to take upon his admission to the United States.

The Secretary of Labor is also required to certify that the employment of such alien workers will not adversely affect the wages and working conditions of workers similarly employed in the United States.

Question 19. Who are regarded as worker immigrants under the law?

Answer. All aliens who apply for admission as immigrants from countries outside the Western Hemisphere and who do not qualify under one of the relative preferences or as a refugee are regarded as worker immigrants. Similarly, all aliens who apply for admission as immigrants from the independent republics of the Western Hemisphere except parents, spouses, and children of U.S. citizens and permanent resident aliens, are regarded as worker immigrants.

Thus, Congress established a policy and procedure designed exclusively to insure an affirmative and positive determination in each individual case of an immigrant seeking to enter this country primarily for gainful employment that he would not displace an American worker in the place to which he was going or adversely affect wages of such workers similarly employed. Unlike the visa preference petition process before the Attorney General, which made provision for sixth preference aliens to file only through an employer, there was no limitations placed on the applications to be made to the Secretary of Labor in regard to job offers. Job offer or not, the absence of the determination concerning the impact on American labor barred the preference. The only criteria was, as Congress intended, protection of the American labor market in all occupations.

This is exactly the way the labor certification has been administered. The Secretary of Labor's concern has been with shortages or surpluses of labor in various occupations, geographic distribution of such conditions and whether

the applicant will likely displace an American worker or adversely affect his wages. He has utilized the job offer, even as to nonprofessionals, only in doubtful areas to assist in resolving the doubt.

Pursuant to the requirements of Section 212(a)(14), the Secretary of Labor promulgated regulations for administering the labor certification provision as 29 C.F.R., Part 60.[13/] As appellant indicates, in general these regulations provided for a blanket certification (Schedule A) for the highly educated (equivalent of a doctorate or masters degree) and selected occupational groups with the equivalent of a bachelor's degree. 29 C.F.R. 60.2(a)(1). The basis for Schedule A was that the Secretary of Labor had determined in advance that shortages existed nationwide for this group. No job offers were required for Schedule A immigrants. On the other extreme, a blanket denial of labor certification (Schedule B), involving largely unskilled labor was promulgated upon the advanced determination that there was no shortage for that group nationwide. 29 C.F.R. 60.2(a)(2). No certification would be issued to Schedule B immigrants even with a job offer. In other occupational categories, there existed ever changing pockets of shortages of labor in the United States which essentially turned on the intended residence of the immigrant. In this category, a selective schedule (Schedule C) was issued listing occupations and areas of the country in which the Secretary of Labor was willing to dispense with a job offer, but which would be decided on an individual basis upon current information available "for the area of intended residence." 29 C.F.R. 60.3(b) (1969). Although professionals (third preference) for unexplained reasons were omitted from §60.3, their

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13/ It is interesting to note the evolution of these regulations as the country moved into its present first major economic slowdown since the labor certification requirement went into effect.

applications in all categories were processed under Schedule C procedure unless their profession fell within Schedules A or B. This was the procedure used in processing appellant's application. Schedule C was subject to prompt change upon changing labor patterns. 29 C.F.R. 60.3(c) (1969). Immigrants not falling within Schedules A, B, or C were required to submit job offers to support their application for a labor certification. 29 C.F.R. 60.3(a) (1969).

In January 1969, the Secretary of Labor amended the regulation to abolish the then Schedule C, but provided in its place a similar independently published "Schedule C-Precertification List" listing occupations and geographic locations for which a blanket certification would be issued. 29 C.F.R. 60.3(c) (1970). The precertification list was not applicable to professionals. The only difference between this schedule and Schedule A was the restriction to particular shortage geographic localities. No job offers were required.

Under the new regulations, professionals not listed on Schedule A or B, are processed as they had been before, except specific provision was now included in the regulations. 29 C.F.R. 60.3(b). They submitted Form 575A giving their profession and intended place of residence. The Secretary of Labor then considered the application as follows:

> All sources of labor available for the area of intended residence will be reviewed. Certification will be issued if warranted by the circumstances at that time. If the review shows workers are available, or that wages or working conditions of workers similarly employed will be affected adversely, the certification will not be issued.

In response to the worsening employment situation in the current economic slowdown, on February 9, 1970, the Secretary of Labor suspended completely the Schedule C-Precertification List. All occupations previously on that list now require job offers in support of labor certification applications.[14/] Job offers still do not guarantee issuance of the certification.

Similarly, on March 12, 1970, due to a "dramatic shift in the supply-demand situation for teacher employment in this country," the Secretary of Labor now requires that a job offer be a part of the application for labor certification for immigrant teachers.[15/]

In sum, it is our view that the statutory scheme, the legislative history and the administrative practice under the preference system and labor certification procedures establish beyond doubt that Congress intended that all immigrants in the third and sixth preferences would be closely scrutinized to ensure that they would benefit the United States by entry into the occupation for which they were granted preference either immediately or within the predictable future and, on the assumption they would enter such occupation, that American labor would not be adversely affected. The first determination, as we have shown, is properly for the Attorney General,

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14/ This suspension was promulgated by U. S. Department of Labor, USTES Regional Bulletin No. 9-70, dated February 9, 1970. For the Court's convenience, it is reproduced in Appellee's Appendix, p. 6a .

15/ See USTES Regional Bulletin No. 13-70, dated March 12, 1970, Appellee's Appendix, p. 8a .

while the latter judgment is for the Secretary of Labor. In terms of the statutory policies, it should make no difference whether the absence of prospective benefit or threat to American labor arises from a specific intent to engage in another occupation or other peculiar circumstances making it unlikely that an individual immigrant will not successfully enter his professional pursuits. The result is the same. Appellant has failed to establish to the satisfaction of the immigration officers that she will successfully pursue her profession. Her application for a third preference as a teacher was properly denied.

II. Appellant was not unfairly treated in processing her preference application.

Appellant contends that she was unfairly treated in the processing of her visa preference application, particularly in the absence of legal counsel,[16/] in that (1) the Immigration Service notice to report for an interview concerning the application did not inform her that she would be questioned about two prior bankrupt cultural operations virtually identical to the cultural center she proposed in her application to operate in the United States so that she could prepare and form a defense and (2) the unavailability of stenographic notes of the interview, which were never transcribed or considered by the district director, allegedly prevent this Court from reviewing the adverse decision as to her financial situation for an adequate evidentiary basis (App. Br. 26-30). These contentions are without merit.

At the very outset, we stress that appellant erroneously invokes procedural arguments and strong language used by the Supreme Court to characterize the incidents and consequences of deportation (App. Br. 28).

16/ We do not take it that appellant is contending that she had a right to counsel for the interview concerning her preference application (App. Br. 29-30). We only point out that an alien is not entitled to appointed counsel in immigration matters even in a proceeding so formal as a deportation proceeding. See Velasquez Espinosa v. I.N.S., 404 F. 2d 544 (C.A. 9, 1968); Nason v. I.N.S., 370 F. 2d 865 (C.A. 2, 1967); Ah Chiu Pang v. I.N.S., 368 F. 2d 637 (C.A. 3, 1966), certiorari denied, 386 U.S. 1037; Burr v. I.N.S., 350 F. 2d 87, 91 (C.A. 9, 1965); Dunn-Marin v. District Director, ____ F. 2d ____ (C.A. 9, decided April 30, 1970). A fortiori, she was not entitled to appointed counsel in this investigative interview on a preference application.

Appellant has already been held deportable as an overstayed visitor in deportation proceedings completed and final many years ago. That order of deportation is not in issue in this litigation and remains outstanding.

In filing a visa petition and an application for preference status, appellant is merely following the procedure for any alien seeking to enter this country for permanent residence. This procedure is designed for and normally completed through overseas facilities while the alien awaits the outcome in his native country. Although, as we will note, there is a procedure for nonimmigrant aliens in this country to change their status to permanent residence, refusal to permit an alien to remain in the United States pending processing of applications for preference status and a visa, preliminary to applying for such adjustment of status, has been held "sufficient on its face." Lee Pao Fen v. Esperdy, 423 F. 2d 6 (C.A. 2, 1970); Siu Fung Luk v. Rosenberg, 409 F. 2d 555, 559 (C.A. 9, 1969). Even if appellant's petition for third preference classification were to be granted, she would still have to apply for the discretionary action of reopening her deportation proceeding (8 C.F.R. 242.22) and apply for permanent residence status under Section 245 of the Act, 8 U.S.C. 1255,[17] which also is dis-

---

17/ Section 245(a) provides:

> SEC. 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

cretionary action to be applied only in meritorious cases. See Santos v. I.N.S., 375 F. 2d 262 (C.A. 9, 1967). An alien applying for adjustment of status is in the same posture as one outside the country seeking admission for permanent residence. Campos v. I.N.S., 402 F. 2d 758 (C.A. 9, 1968); Talanoa v. I.N.S., 397 F. 2d 196 (C.A. 9, 1968); 2 Gordon and Rosenfield, Immigration Law and Procedure §7.7e (1969).

Due to the absolute plenary power of Congress to control exclusion of aliens from the United States, the concept of procedural protection for aliens seeking to enter this country is generally limited to the principle that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Ekiu v. United States, 142 U.S. 651, 666 (1892); see also, Boutilier v. I.N.S., 387 U.S. 118, 123-124 (1967); Shaughnessy v. Mezei, 345 U.S. 206 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 594-596 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Fun v. Esperdy, 335 F. 2d 656 (C.A. 2, 1964); compare, Kwang Hai Chew v. Golding, 344 U.S. 590 (1953). For the alien still outside the United States, a consular decision concerning issuance of a visa is not subject to either administrative or judicial review. Loza-Bedoya v. I.N.S., 410 F. 2d 343, 347 (C.A. 9, 1969); United States ex rel. Ulrich v. Secretary of State, 30 F. 2d 984, 986 (C.A.D.C., 1929), certiorari denied, 279 U.S. 868; United States ex rel. London v. Phelps, 22 F. 2d 288, 290 (C.A. 2, 1927), certiorari denied, 376 U.S. 630; Licea-Gomez v. Pilliod, 193 F. Supp. 577, 582 (N.D. Ill., 1960); Sections 104(a) and 221 of the Act, 8 U.S.C. 1104(a) and 1201; H. Rep. 1365, 82d Cong., 2d Sess., p. 36 (1952).

The United States Court of Appeals for the Fifth Circuit has similarly noted concerning the visa issuing process and underlying requirements that

> Courts are not universal monitors or ombundsmen of the administrative apparatus of government. When constitutional rights will not be violated, Congress can make an administrative officer the apogee of finality, and no constitutional safeguard requires judicial review in denying entry to aliens.

Cobb v. Murrell, 386 F. 2d 947, 950-951 (C.A. 5, 1967). Although appellant has acquired access to our courts on her preference petition by virtue of her presence within the country, the judicial review under the concepts outlined should be strictly limited to issues such as whether the administrative authorities acted within their statutory and regulatory authority, whether there was any evidence to support the administrative decision, whether discretionary power was abused and whether the applicant was prevented from offering evidence relevant to the decision.

In the instant case, Congress has established the procedure for processing preference applications. Every immigrant is presumed to be a nonpreference immigrant until he establishes to the satisfaction of designated officers that he is entitled to a preference. Section 203(d) of the Act, 8 U.S.C. 1153(d). The process is commenced by the alien submitting a petition in such form as the Attorney General by regulation prescribes and shall contain such information and be supported by such documentary evidence as the Attorney General may require. Section 204(a) of the Act, 8 U.S.C. 1154(a). The regulations and implementing forms on their face comprehensively seek all information relevant to the benefit sought, including

education, training, licenses, job experience, etc. 8 C.F.R. 204.2(e); Form ES-575, Application for Labor Certification. The Attorney General is not bound by the furnished information, but is expressly directed to conduct an investigation of the facts in each case. Section 204(b) of the Act, 8 U.S.C. 1154(b).

The regulations specifically provide that a third preference petitioner may be required to appear in person before an immigration officer prior to the adjudication of the petition to be questioned under oath concerning the allegations in the petition. 8 C.F.R. 204.1(c) (1970). Since the applicant is seeking a benefit for which he must show eligibility, he cannot refuse to answer relevant questions, even on the ground of the Fifth Amendment privilege against self-incrimination. Kimm v. Rosenberg, 363 U.S. 405 (1960). The interview is not a "proceeding" or a "hearing." It is an interview by immigration investigating agents such as might be conducted with any witness in the course of any investigation. There is no requirement that the interview be taken down verbatim or, if it is recorded, that it be transcribed for the purposes of decision. For obvious practical reasons, the normal procedure in investigating petitions of this type result only in agents' investigative summary reports and attachments thereto, in addition to the information supplied by the petitioner, as a basis for decision by the district director.

While there may be possibilities in investigative interviews, as in any communication exercise, for unpreparedness, ambiguous answers or mistakes,

this inherent problem need not make the matter unfair.[18/] Indeed, an investigative interview with the applicant has the dual purpose of developing information and acquainting the petitioner with any adverse information which may require explanation. In petitions of this type, the applicant can always submit any kind of statement, sworn or unsworn. Regulations require that applicants be permitted to inspect the record which will constitute the basis for decision and, if the decision will be adverse to the applicant on the basis of derogatory evidence considered by the Service and of which the applicant is unaware, he must be advised thereof and given an opportunity to rebut it. Any explanation, rebuttal or other evidence submitted by the applicant is included in the record of proceedings. 8 C.F.R. 103.2(b) (1970). Appellant therefore had ample opportunity to explain or rebut any significant ambiguities or unwarranted conclusions drawn from evidence in the file. Such was not done.

18/ Although we do not suggest that a person has a right to be informed of the specific subject matter of a particular investigative interview so as to permit a person to "prepare" answers (the opposite might be more conducive to the truth), appellant here certainly had ample notice. The interview was to inquire into her preference application based on her assertion that she intended to own and operate a cultural school in this country. She may have thought her financial situation was immaterial so as to not require preparation, but that hardly invalidates the notice. In fact, the notice suggests that inquiry may be made into any part of the factual assertions in the application.

The reason is simple. There is no dispute about appellant's bankrupt situation and her basic history of financial disasters associated with her cultural center activities. She contests the characterization by the Regional Commissioner that she admitted in oral argument that her indebtedness was "somewhat less than $30,000," but the statement of facts, supra, shows that this did not miss the mark far and that the record supported figures in that general vicinity independent of her statement. Assuming the $30,000 was on the high side, appellant has never suggested that she was not in fact bankrupt, deeply in debt and completely without resources to resolve her obligations, which is the significant basic conclusion of the district director and Regional Commissioner. Her statements in the investigation and in oral argument before the Regional Commissioner admitted that this is the third cultural center type project of appellant's to succumb in the same manner. She does not question the accuracy of these facts; indeed, appellant has apparently considered her prior two projects and her bad financial situation in relation thereto as immaterial to the present application and has resisted all efforts to inquire into it (App. p. 16). In our view, it is this attitude of appellant's that resulted in the characterization of her interview as "evasive, verbose, and vague in regards to most of the questions asked of her".

Finally, counsel for appellant places particularly strong emphasis on the district director's statement in his decision that appellant stated it was her intention to teach only in a school established and operated by her as possibly unfounded (App. Br. 9, 30). We merely point out that the application stated that that was her intention, that her whole professional history before and after indicated she would stick to this type of activity over the greatest of obstacles, and that, of all the conclusions of the

district director, this one has never been questioned by appellant either in the administrative consideration or in the courts. It is speculative in the extreme to suggest at this point that the conclusion may be based on an ambiguous answer or statement.

In our view, appellant had a fair consideration appropriate to her application for a third preference. She has had complete freedom to present any material or evidence she deemed important and, indeed, has supplied large volumes of it. None of the evidence, however, detracts from the basis for decision in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the administrative authorities acted well within their statutory power on more than ample evidence and that appellant's application for a third preference was processed in a fair manner in accordance with applicable statutory and regulatory procedures. Accordingly, the district court's judgment in this case should be affirmed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JERRY TEH FONG TANG,

Petitioner,

v.

DISTRICT DIRECTOR OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Civil No. 68-757-R

JUDGMENT

The Motion for Summary Judgment of Respondent in the above-entitled action having come on for hearing before the Honorable Manuel L. Real on the 24th day of June, 1968, Petitioner having appeared through his attorney, Hiram W. Kwan, and the Respondent having appeared through his attorneys, Wm. Matthew Byrne, Jr., United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief of Civil Division, and Carolyn M. Reynolds, Assistant U. S. Attorney, by Carolyn M. Reynolds, and the Court having considered the pleadings herein, the certified transcript of record, the memoranda submitted on behalf of the parties, and the oral argument at the time of the hearing on Respondent's Motion for Summary Judgment, and in accordance with the Findings of Fact and Conclusions of Law entered herein,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and the same is hereby entered in favor of Respondent and against the Petitioner, affirming the decision of the Respondent, District Director of Immigration and Naturalization Service, that Petitioner is not eligible for a preference classification as a member of the professions under Section 203(a)(3) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1153(a)(3).

Costs are taxed against Petitioner in the amount of $20.00.

DATED: This 15th day of July, 1968.

MANUEL L. REAL

UNITED STATES DISTRICT JUDGE

Presented by:

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief of Civil Division

CAROLYN M. REYNOLDS

CAROLYN M. REYNOLDS
Assistant U. S. Attorney
Attorneys for Respondent.

LODGED

FILED

JUN - 5 1968

JUL 16 1968

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BY _____ DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JERRY TEH FONG TANG,

Petitioner,

v.

DISTRICT DIRECTOR OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Civil No. 68-757-R

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

Respondent's Motion for Summary Judgment having come on for hearing June 24, 1968, in the above-entitled Court, before the Honorable Manuel L. Real, the Petitioner being represented by his attorney, Hiram W. Kwan, and the Respondent being represented by his attorneys, Wm. Matthew Byrne, Jr., United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief of Civil Division, and Carolyn M. Reynolds, Assistant U. S. Attorney, by Carolyn M. Reynolds, and after a thorough consideration of the pleadings filed herein, as well as the memoranda submitted by the parties, and the oral argument made at the time of the hearing on the Motion, the Court makes the following Findings of Fact and Conclusions of Law:

/ / /

FINDINGS OF FACT

I

Petitioner, a native and citizen of the Republic of China instituted this action for review of the District Director's decision denying his Petition for Classification under Section 203(a)(3) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1153(a)(3).

II

Petitioner claims that the District Director erred in finding that he did not qualify as a member of the professions as an accountant.

III

The evidence shows that Petitioner had a Bachelor of Arts degree in Business Administration from the National Taiwan Univereity, Taipei, Taiwan (Republic of China); that he worked as a junior accountant in Taiwan for approximately 2 1/2 years between 1961 and 1964; that he entered the United States in 1964 as a nonimmigrant student and that since he has been in the United States he has not been employed, he has taken two graduate courses in Business Administration and is currently enrolled as an undergraduate majoring in engineering at San Fernando Valley State College.

CONCLUSIONS OF LAW

I

This Court has jurisdiction of this action.

II

This Court has jurisdiction of the parties to this action.

III

The District Director did not abuse his dis-

eretion in finding that the Petitioner did not have a bona fide intent to engage immediately or in the near future in his claimed field, i.e. that of an accountant, or in a related field; and, therefore, that petitioner failed to qualify as a member of the professions within the meaning and intent of Section 203(a)(3) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1153(a)(3).

IV

Judgment should be entered in favor of Respondent and against Petitioner, affirming the decision of the District Director that Petitioner is not eligible for a preference classification as a member of the professions under Section 203(a)(3) of the Act, supra.

DATED: This 15th day of July, 1968.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Presented by:

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief of Civil Division

CAROLYN M. REYNOLDS
CAROLYN M. REYNOLDS
Assistant U. S. Attorney
Attorneys for Respondent.

MANPOWER ADMINISTRATION
WASHINGTON, D.C. 202 0

USES REGIONAL BULLETIN NO. 9-70

Date February 9, 1970

In reply
refer to: MMIT

To : Regional Manpower Administrators

Subject : Suspension of Precertification for Occupations on the Schedule C-Precertification List

In view of announced personnel cutbacks by the Department of Defense affecting 1.27 million workers, and of cutbacks in NASA and other programs, the precertification of occupations on the Schedule C-Precertification List has been suspended. The Departments of State and Justice have been so advised.

Any alien who applies hereafter for a labor certification in a Schedule C-Precertified List occupation will be advised by Consuls and Immigration Service officers that a job offer is required. While this may eventually result in an increase in workload in job offer cases handled in the regional offices, any increase will be delayed by the period of time the alien applicants will require to develop job offers. Further, if the decrease in applications for alien employment certification which occurred in the second quarter of FY 1970 continues, (a net decrease of approximately 7,000 applications) there will be no increase in workload for the regions due to the suspension of the Schedule C- Precertification List.

As indicated above, the suspension of precertification is effective immediately except in the following instances:

1. The applicant for a labor certification who submitted an application which was accepted for Schedule C-Precertification List processing by a Consul or Immigration Service officer prior to receipt of notice of suspension, is considered a "pipeline case" provided he is found to be fully qualified and the finding is made by March 31, 1970. The validity period of his precertification is one year from the date of the finding.

2. The applicant heretofore precertified under the Schedule C-Precertification List, whose certification has been in effect for less than one year, remains precertified for the duration of a year from the date of precertification. If a revalidation is required thereafter, and if the expiration of the initial one year validity period occurs after June 30, 1970, a job offer is necessary.

3. The certification of an applicant heretofore precertified under the Schedule C-Precertification List, and assigned a priority date, for whom an immigrant visa will be issued prior to July 1, 1970, is automatically revalidated up to and including June 30, 1970.

The provisions outlined above will assure that all persons who have been precertified under the Schedule C-Precertification List during the past year or whose applications have been accepted for processing prior to the date of the suspension of precertification will have been granted an initial validity period of one year.

Any applicant precertified for the period of an entire year, who requires a revalidation on and after July 1, 1970, must present a job offer.

You will be advised as and when data become available which will warrant the reinstatement of any occupation, or the placing of a new occupation, on the Schedule C-Precertification List.

Please disseminate this information as required.

Robert J. Brown

ROBERT J. BROWN
Associate Manpower Administrator for
U. S. Training and Employment Service

RL

U.S. DEPARTMENT OF LABOR
MANPOWER ADMINISTRATION
WASHINGTON, D.C. 20210

USTS REGIONAL BULLETIN NO. 13-70

Date : March 12, 1970

In reply refer to: MLTI

To : Regional Manpower Administrators

Subject : Procedures for Certifying and Revalidating Applications for FSA - Not Schedule A Teachers

There has been a dramatic shift in the supply - demand situation for teacher employment in this country. Reasons for the increased number of our own graduates entering the teaching field in recent years include substantially higher pay scales, stronger organization, draft deferments, increased opportunities for minority groups, and population trends. During the same period the demand has been decreasing as the post World War II baby bulge has moved out of school.

As a result of reports submitted by the regional offices, a recent study by the Bureau of Labor Statistics, and an analysis of reports from the various State employment services, we must now conclude that the supply of teachers is generally in balance with demand. The BLS study also predicted that if the present pattern continues the supply will significantly exceed the demand in the immediate future.

In view of these developments, it was essential that we take immediate steps to reduce the number of aliens seeking to enter the country as teachers. Aside from the effect on our resident work force, there is little likelihood that most aliens will find employment in their field and face the resulting frustrations. At the same time, since there are some employment opportunities for qualified aliens in certain locations and disciplines, we can greatly minimize those instances where aliens previously certified without a specific job offer would now be required to have one for revalidation purposes.

To meet the objectives of protecting the limited job opportunities for the resident work force while giving full consideration to the entry of most aliens holding certifications for whom visas will be available this fiscal year, and providing adequate advance notice to the U. S. Consulates to alert

other intending aliens of the need for job offers, the following conditions and procedures covering labor certifications for teachers become effective as noted:

1. New Applications

All applications for PSA - Not Schedule A teachers received by the U. S. Consuls and the Immigration and Naturalization Service on and after receipt of notification must be accompanied by a job offer on Form ES-575B. Individual determinations will be made based on availability and adverse effect considerations.

2. Applications Currently and Actively in Process

Applications accepted by Consular and Immigration and Naturalization Service Offices for processing as PSA - Not Schedule A teachers prior to their receipt of the notice and which are received by the Department of Labor on or before March 31, 1970, will be accepted without a job offer. Determination will be made based on the qualifications of the alien, the teaching level and subject (if any) designated, and the availability of resident workers in the area of intended employment. If certification cannot be made, the denial will be without prejudice to consideration with an ES-575B job offer.

3. Applications Requiring Revalidation

Aliens previously certified as PSA - Not Schedule A teachers who will require revalidation and for whom visa numbers will be issued on or before June 30, 1970, and who are not destined to the areas listed on the attached List of Teacher Surplus Areas, are automatically revalidated until June 30, 1970.

Applicants meeting the above conditions, but who had selected an area of intended employment now classified as surplus, at the discretion of the Consular or the Immigration and Naturalization Service Offices as to the alien's true intent, may be offered the opportunity to select a non-surplus area.

All other applications which require revalidation must be individually reviewed by the Department of Labor and will require job offers on Form ES-575B.

Confirming our earlier telephoned instructions to each regional office, all teacher revalidation cases in your offices are to be returned immediately to the appropriate Consul or Immigration and Naturalization Service Office. This is necessary since the Department of Labor will not know which will qualify for visas by June 30, 1970, and all others will require job offers.

The attached list of States designated as teacher surplus areas is only to be used for revalidation processing purposes for those aliens for whom visas will be available on or before June 30, 1970. All determinations for new applications accompanied by job offers and pipeline cases with or without job offers reaching you before March 31, 1970, are to be made based on availability and adverse affect as appropriate.

These new procedures were transmitted to the Departments of State and Justice on February 4 and are now in effect. Kindly inform the State agencies of these new procedures and request that they accept PSA - Not Schedule A teacher applications for processing as job offer cases.

ROBERT J. [illegible]
Associate Manpower Administrator for
U.S. Training and Employment Service

Attachment

TEACHER SURPLUS AREAS

Unless otherwise noted the entire State is a surplus area.

Alaska

Arizona

California

Colorado

Georgia

Hawaii

Idaho

Louisiana

Maine

Maryland

Massachusetts

Missouri

New Hampshire

New Jersey

New Mexico

New York - New York City, Albany, Schenectady, Troy

Oregon

Pennsylvania

Rhode Island

Texas

Vermont

Washington

U. S. Department of Labor
Manpower Administration
Office of Technical Support
Division of Immigration and
Rehabilitation Certification

January 1970

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23993

HELENA HILDA BUTTERFIELD,

Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Appellee.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

William H. Dempsey, Jr.
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734 Fifteenth Street, N. W.
Washington, D. C. 20005

Attorneys for Appellant

Of Counsel:

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Attorneys for Appellant

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734 Fifteenth Street, N. W.
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No. 23993

HELENA HILDA BUTTERFIELD,

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Appellee.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

We are not prepared to argue that the statutory scheme which appellee sketches in its brief -- one in which INS determines not only whether an alien applicant for third visa preference has the necessary professional qualifications but also whether the applicant has the present financial capacity to practice his profession in the United States -- would be irrational. What we do argue is that this was not the plan adopted by the Congress in 1965 when it amended the Immigration and Nationality Act by enacting P.L. 89-236. The statutory scheme that was adopted by the

Congress makes third preference status available to "members of the professions," with the sole INS function being to determine whether the applicant has sufficient education and training to qualify in a professional category. Appellant's professional qualifications as a teacher have always been conceded by INS, and that agency therefore acted beyond its authority in denying her preference application on the ground that her plan to open a cultural teaching center was impractical in light of her strained financial circumstances. 1/

Appellee has devoted its brief in large part to a discussion of the legislative history of P.L. 89-236, but as we demonstrate in this reply brief that discussion, to the extent it is relevant at all, supports our view of the limited INS function in reviewing applications for third preference. We also show, in the second part of this reply brief, that appellee has utterly failed to meet our contention that the INS action cannot be sustained even if its construction of the controlling statute somehow can be.

I

As we understand it, appellee finds indications both in specific statutory language and in general policies underlying the visa preference system that Congress must have intended to impose a "capacity-to-practice" requirement on aliens who apply for third preference status as members of

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1/ Appellee makes a considerable point in its statement of facts about appellant's financial reverses and indebtedness (See, e.g., Brief for Appellee, pages 3-4). Appellant has vigorously denied throughout this proceeding that her economic troubles were attributable in the slightest degree to her own mismanagement, and she has also consistently denied some of appellee's factual allegations respecting her affairs. We have not undertaken to discuss these disputes, either in the opening brief or in the reply brief, because as we understand appellee's position the only circumstance of any possible legal significance is that appellant did not in fact have the means to open and operate a cultural center in 1966-1967. If INS' notions about the reasons or responsibility for the existence of this fact had any bearing on the denial of appellant's third preference application, then the agency decision was based on standards that have never been explained, much less justified.

the professions. The specific provision considered by appellee to be importantly involved is Section 212(a)(14) of the Act, as amended, 8 U.S.C. § 1182(a)(14), which provides for the exclusion of a third preference alien seeking to enter the United States "for the purpose of performing skilled or unskilled labor" unless the Secretary of Labor certifies (a) that there is a labor shortage in that field of employment and (b) that the employment of the alien would not adversely affect wages and working conditions of persons already employed in that field. It is not urged that appellant was excludable under the provision in the sense that she did not obtain or was not eligible to obtain certification by the Secretary of Labor. Appellant was in fact certified, and appellee has never contended that she should not have been. Rather Section 212(a)(14) is asserted to be relevant in the sense that it reflects a legislative intent that alien professionals should be admitted to the United States only for the purpose of practicing their professions, and that accordingly an alien professional should be denied admission if INS finds that for one reason or another he lacks the financial means necessary to practice his profession "either immediately or in the foreseeable future" (Brief for Appellee, page 11). Beyond that, appellee has argued that the actual practice of a profession is the benefit to the United States that the third preference is designed to promote, and that this underlying policy would be frustrated if alien professionals were admitted on a preferred basis even though the INS had determined that there was no prospect of their early entry into practice. We will deal with this policy argument after first dealing with appellee's argument respecting the implications of Section 212(a)(14).

The implications of Section 212(a)(14)

The centerpiece of appellee's position is the argument that a third preference immigrant who lacks the capacity to practice the profession in which he has been certified might as a consequence take up another occupation and compete in a field of employment in which no labor shortage exists and the alien has not been certified. Thus, according to appellee, the Section 212(a)(14) purpose of protecting the American labor market would not be served.

To begin with, assuming the Congress was concerned with the possibility that third preference aliens might move outside their professions and invade fields of employment where no labor shortage exists, it is as a minimum clear that this is a problem with which the Secretary of Labor alone is authorized to deal, for the Act assigns to him all functions relating to the protection of the domestic labor market.[2/] But beyond this the fact is that this was plainly not the kind of risk that concerned the 89th Congress when it enacted Section 212(a)(14) in its present form. Nor, as the long passage of testimony quoted at pages 20-24 of appellee's brief

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2/ Appellee has not been able to point to anything in the legislative history or in the Act itself even suggesting that INS has authority to determine the impact of an alien's admission on the labor market. The witnesses for organized labor recommended to the Congress that this authority should be in the hands of the Secretary of Labor, who has the necessary information and expertise, and Section 212(a)(14) makes it clear that Congress accepted this recommendation. See testimony of Kenneth A. Meiklejohn and Kevin J. Butler, representatives of the AFL-CIO. Hearings on S. 500 before Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 89th Cong., 1st Sess. (1965), at 644. Appellee does refer weakly (Brief, page 13) to Section 204 of the Act, 8 U.S.C. § 1154, which makes ultimate approval of preference petitions a function of INS. But Section 204(b) of the Act, 8 U.S.C. § 1154(b), specifies that INS is to act on third preference petitions only "after consultation with the Secretary of Labor", and so appellee cannot find here any INS authority to make an independent judgment about protection of the labor market.
[footnote continued on page 5.]

clearly demonstrates,[3/] was this kind of risk the concern of the labor witnesses who advocated that some form of protective provision be included in the 1965 amendments to the national immigration law.[4/] Moreover, if there is any such risk it would not be significantly reduced

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2/ continued -

Moreover, appellee's position that INS can make an independent evaluation of a third preference alien's potential impact on the labor market, after such alien has been certified by the Secretary of Labor, is in direct conflict with the view of the Board of Immigration Appeals. In Matter of Cardoso, Interim Decision #1963 (April 25, 1969), the Board said:

> "The labor certification, with its underlying clearance procedures, was the mechanism which Congress employed as a means for screening out immigrants whose admission would adversely affect American labor.
>
> "Once the intending immigrant successfully passed through the screening procedures and the Secretary of Labor issued him a labor certification, the way was paved for visa-issuance and admission for permanent residence. We can find nothing in the text of section 212(a) (14) or in its legislative history to indicate that the admission of an alien so documented was designed by Congress as a conditional entry, to be convertible into permanent residence only after a stated probationary period (footnote omitted). Neither does this provision of the statute, or any other, make such an admission one on condition subsequent, subject to defeasance if the alien does not take up and maintain for a stated period of time the employment he has contracted to perform with the employer to whom he was destined (footnote omitted)."

What this decision -- which involved the status of a sixth preference alien who was subject to a job offer requirement at the time of his admission -- demonstrates is that the only statutory procedures relating to the protection of American labor are the Section 212(a)(14) certification procedures administered by the Secretary of Labor, and that there is no warrant for any additional procedure manufactured by INS.

3/ And see discussion at pages 7-8, supra.

4/ Appellee has correctly noted in its brief (page 20, note 12) that Section 212(a)(14) was adopted at the urging of organized labor. At least two Congressmen, one of whom was the Chairman of the Subcommittee on Immigration and Naturalization of the House Judiciary Committee, commented to this effect during the debates in the House. 111 Cong. Rec., Part 16, pp. 21579, 21586. And as far as we have been able to discover the witnesses representing organized labor were the only ones who recommended immigration controls of the kind embodied in Section 212(a)(14).

even if the INS were to assume the new administrative power that it claims in this case. This is so because an applicant's financial position can provide no assurance that he will actually practice his profession once granted a visa.

The usual form of statutory assurance that immigrants will attach themselves to particular fields of employment is the job offer requirement, and as we indicated in our opening brief (page 23) members of the professions were faced with such a requirement prior to 1965. The legislation submitted in that year by the Administration (as H.R. 2580 and S. 500) proposed to abolish the job offer requirement for what was then the first preference category, which included members of the professions. During consideration of this broad reform legislation the Congress rearranged the previously existing preferences (there were four) and created some new ones (making a total of seven), but the proposal to drop the job offer requirement for members of the professions was accepted. The result -- and it could not have been an inadvertent one in view of the fact that it was the subject of testimony by at least four major Administration witnesses 5/ -- is that since the enactment of P.L. 89-236 the admission of aliens with professional status, who fall within what is now the third preference, defined by Section 203(a)(3) of the Act, 8 U.S.C. § 1153(a)(3), has not been conditioned on offers of employment.

5/ See opening Brief for Appellant, page 22.

Without coming to grips with the fact that the job offer requirement was abolished,[6] appellee asserts that in enacting P.L. 89-236 the Congress did not intend to liberalize the terms of admission for aliens who qualify as professionals. Organized labor opposed this sort of a change, says appellee, and accordingly it was not made (Brief for Appellee, page 20). Appellee is wrong on both counts. The change was made -- the abolition of the job offer requirement speaks for itself on this score. And it was never opposed by organized labor in the first place. The exchange that occurred during the House hearings between Congressman Moore of West Virginia and witnesses representing the AFL-CIO, and that appellee has reproduced in its brief, proves only that organized labor didn't care whether aliens with professional status were admitted without any guarantee that they would take up particular employment. It was only immigrant competition in the field of manual labor that concerned these witnesses,[7] as their testimony in the

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6/ Appellee is critical (Brief, page 17) because the testimony we cited in our opening brief in connection with the abolition of the job offer requirement was directed at the legislation proposed by the Administration, which according to appellee "came through the legislative process beyond recognition." But we don't understand this criticism. While it is certainly true that some changes were made in the Administration's bill, none of these had to do with the abolition of the job offer requirement for members of the professions. That proposal came through the legislative process unchanged, and that is the only point we were making in our opening brief. Appellee's prolonged discussion of other respects in which P.L. 89-236 as enacted differed from the legislation proposed is irrelevant.

7/ An additional concern of the witnesses was that the Secretary of Labor should have the exclusive authority to determine whether there were existing labor shortages in particular fields of employment, rather than sharing this authority with the Attorney General.

Senate hearings makes even more clear. So for example, in responding to a question about the abolition of the job offer requirement proposed by S. 500 for the first preference, one of the AFL-CIO representatives said:

> "With regard to the first preference, Mr. Chairman, as we stated, we are concerned with the change or the deletion of the need for an available job for the prospective first preference quota immigrant, so far as this pertains to the trades. Now, certainly, so far as professional people are concerned, scientists, teachers, we find little problem here. But so far as machinists or tool or die makers, as we have indicated in our testimony, are concerned, here we do have some concern." Testimony of Kevin J. Butler, AFL-CIO representative, Hearings on S. 500 before Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, 89th Cong., 1st Sess. (1965), at 644.

The distinction made by these two witnesses between members of the professions and members of the crafts was the same one the Congress made when it enacted P.L. 89-236 and created the present visa preference system. Aliens in the professional class were made eligible for the third preference, subject only to the Secretary of Labor's certification under Section 212(a)(14) that the appellant's particular profession was not overcrowded -- and there is serious doubt that even this control procedure, which so far as we can determine was not recommended by the witnesses representing organized labor or any other witness who testified on P.L. 89-236, is applicable in the usual third preference case.[8/] Aliens in the craft class were made eligible for the sixth

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8/ By its own terms Section 212(a)(14) is applicable to aliens who come to the United States for the purpose of performing "skilled or unskilled labor," and the quoted words are the same ones used by Section 203(a)(6), 8 U.S.C. § 1153(a)(6) to describe the role of sixth preference immigrants. The repitition in Section 212(a)(14) of the very language that was used to define the third preference can hardly have been coincidence, and it suggests that the third preference applicants are only subject to the certification procedure if their express purpose in coming to the United States is to work in some "skilled or unskilled labor" outside the field of their professions. See opening Brief for Appellant, note 31.

preference, subject both to the Section 212(a)(14) certification procedure and -- apparently because organized labor felt the need for protection with respect to immigration of this type -- to the job offer requirement prescribed by Section 204(a), 8 U.S.C. § 1154(a).

In sum, there is nothing in the legislative history of Section 212(a)(14) -- just as there is nothing in its language -- to support appellee's view that INS is empowered to reject, on grounds relating to labor impact, third preference applicants who have been certified as eligible by the Secretary of Labor.

The policy argument

Appellee argues in effect that actual practice was the consideration for which the Congress bargained in granting third preference to members of the professions, and that INS can enforce the bargain by rejecting applicants who in the opinion of that agency are unable to practice for one reason or another.[9/] So far as the first of these propositions is concerned, we have already shown that Congress took away the instrument -- the job offer requirement -- traditionally used to tie immigrants to particular employment, and this action is obviously inconsistent with the kind of legislative policy on

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9/ On the standard third preference application form that appellant filled out (J.A. 1), the applicant is asked to answer "Yes" or "No" to the question whether he intends to practice his profession in the United States. If the answer is "No," the applicant is asked to "explain." Appellant of course answered the question "Yes" since she had definite intentions of establishing a center for the instruction of cultural subjects in this country, but we think the application form -- with its clear implication that intent to practice is not one of the mandatory conditions for third preference -- is evidence that INS itself has not always construed the requirements of the Act as it construed them in appellant's case.

which appellee relies.[10] Beyond that, the Congress showed a strong concern for the quality -- in terms of levels of education and experience -- of the aliens who would be coming in under the annual numerical ceiling on immigration, and this concern would warrant a preference for professionals whether or not they intended or were able to engage in practice.[11]

So far as appellee's claim of INS authority is concerned -- to the extent it is not completely disposed of by our discussion of the implications of Section 212(a)(14) and the underlying purposes of the third preference -- we think the only important policy consideration involved is that INS should not be allowed to exercise powers that the controlling statute does not confer. The Immigration and Nationality Act is full of provisions that commit various factual and discretionary determinations to the Attorney General,[12] who acts in these matters through the INS. Even under the third preference provision,

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10/ See, e.g., S. Rep. 748, 89th Cong., 1st Sess. (1965), at 13; 111 Cong. Rec., Part 16, at 21589, 21597. And in his testimony on H.R. 2580, Secretary of Labor Willard Wirtz advocated the abolition of the job offer requirement for members of the professions on the ground that the admission of such aliens would benefit the United States quite apart from the practice of their professions. See opening Brief for Appellant, pp. 23-25.

11/ We note that if appellee is correct in its view that the words "for the purpose of performing skilled or unskilled labor" as used in Section 212(a)(14 means that alien professionals are entitled to third preference only if their purpose is to practice their professions, the result would be that this class of aliens -- professionals without any intent to practice -- would not be entitled to an immigrant visa even on a nonpreference basis. This is so because Section 212(a)(14) is by its terms applicable to nonpreference immigrants as defined by Section 203(a)(8), 8 U.S.C. § 1153(a)(8), as well as to third preference immigrants as defined by Section 203(a)(3), 8 U.S.C. § 1153(a)(3).

12/ See, e.g., 8 U.S.C. § 1181(b) (readmission documents), 8 U.S.C. §§ 1182(a)(1)-(a)(13) and (a)(15)-(a)(31) (exclusion of aliens), 8 U.S.C. § 1253(a)-(b) (country of deportation), 8 U.S.C. § 1254(a) (suspension of deportation), 8 U.S.C. § 1255(a) (adjustment of status).

Section 203(a)(3), the INS determines whether the applicant is qualified as a member of the professions, and this determination -- made favorably to appellant in this case -- is entitled to respect on judicial review.[13] But nowhere in the Act's careful delineation of INS responsibilities is there any provision authorizing that agency to consider anything other than professional qualifications in passing on third preference applications of aliens already certified as eligible by the Secretary of Labor.[14]

II

We argued in our opening brief that the procedures employed by INS were unfair because they were calculated to produce -- and did in fact produce -- misleading information on the very matters that appellee asserts are relevant to a proper disposition of appellant's application. For the most part appellee has countered with an argument that an applicant for visa preference is not entitled to the full range of protections that are

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13/ See, e.g., Tang v. I.N.S., 298 F. Supp. 413 (C.D. Cal. 1969); Factora v. I.N.S., 292 F. Supp. 518 (C.D. Cal. 1968).

14/ The INS-imposed requirement that a third preference applicant have the present or foreseeable capacity to practice his profession has led to arbitrary results. For, for example, in Matter of Maher, 12 I & N Dec. 680 (Reg. Comm. 1968), an applicant in the profession of dentistry was granted third preference even though it appeared that two and perhaps four years of full-time study in a dental college would be required before he could obtain a dental degree and be eligible to practice in this country. If INS could find capacity to practice in this case, we do not understand how it could reach the opposite result in appellant's case where temporary financial difficulties alone prevented appellant from realizing her immediate plans.

CERTIFICATE OF SERVICE

I certify that the Reply Brief For Appellant was served on the appellee by mailing copies, first class postage prepaid, to Will Wilson, Assistant Attorney General of the United States, and Paul C. Summitt of the Department of Justice, at their offices in the Department of Justice, Washington, D. C., and to Thomas A. Flannery, United States Attorney for the District of Columbia, at his office in the United States Court House, Washington, D. C., on this 11th day of August, 1970.

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appropriate in an adversary proceeding. Appellee has answered a contention that we never made. Our point was simply that due process entitled appellant to minimum conditions of procedural fairness having to do with the opportunity to be heard -- a point that appellee does not dispute and that is established by authorities cited in our opening brief (pages 27-28).

The basic procedural defect is that, prior to the administrative hearing in December 1966 at which appellant was interrogated under oath and at which much of the evidence respecting her financial affairs was allegedly adduced,[15/] appellant was never advised that the decision on her application for third preference depended in the least degree on her financial capacity to open and operate a cultural center. Appellee does not even contend that the INS hearing notice was sufficiently precise to alert appellant to the fact that her financial affairs were a relevant consideration. If appellant had been properly alerted, she might well have given a satisfactory account of the matters that were resolved against her because of her alleged inability to recall exact details of numerous complicated events and because her manner was allegedly "evasive, verbose, and vague." To the extent that derogatory information in the INS file was disclosed to her at the hearing, with adequate notice she might well have persuaded INS officials that her indebtedness -- which those officials seemed to believe was the fault of her own mismanagement and irresponsibility -- was in fact the product of

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15/ We say "allegedly adduced" because appellant has denied making some of the statements attributed to her (see Brief for Appellant, page 27) and because the shorthand notes of the hearing have been lost.

transactions in which she had been defrauded by other persons. And what is even more important, it is almost inconceivable that appellant would have stated that her intention was to teach only in a school that she established herself[16/] if she had realized that an adverse finding on her financial capacity to establish such a school would be fatal to her application. The record is barren of any suggestion that appellant lacked the financial capacity to teach in a school other than one that she established, and appellant would surely have expressed her intention to teach outside her own cultural center had she recognized the relevance of such an answer.

16/ The District Director found that appellant made such a statement (J.A. 11).

CONCLUSION

For the reasons set forth in our opening brief and in this reply brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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